No. 11381

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

HYMAN STILLMAN and LOU SEGAL,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANTS' OPENING BRIEF.

MORRIS LAVINE,
620 Bartlett Building, Los Angeles 14,
Attorney for Appellants.

Parker & Company, Law Printers, Los Angeles. Phone MA. 6-9171.

TOPICAL INDEX

PAGE

Jurisdiction 1

Short statement of the facts 2

Summary of the argument 10

Specification of errors 16

Argument 21

I.

The indictment was invalid 21

II.

The termination of the statute and the revocation of the regulations thereunder ended any possibility of any prosecution 27

There was no charge upon which the appellants were duly tried under the indictment and the proceedings were therefore in violation of due process of law guaranteed by the Fifth Amendment 27

III.

The indictment and proceedings violated the due process clause of the Fifth Amendment to the United States Constitution and the Sixth Amendment in failing to inform the accused of the exact nature and cause of the accusation 37

The trial was a sheer denial of due process of law. The indictment fails to state a public offense 40

Congress thought the words "as amended" were essential to each change in the statute, so did the Administrator in referring to his authority under the Regulations. He also thought it essential to refer to the Regulations as "Revised" Regulations under the amended statute. Can the pleader in an indictment do less? 48

PAGE

The denial, under the circumstances of this case, of a bill of particulars, was error 49

The court erred in refusing the defendants a bill of particulars, as demanded 49

IV.

The verdicts are contrary to the law and the evidence. The evidence is insufficient to support the verdict 51

Prices on invoices were prices charged 62

V.

The Regulations as to the type of records to be kept were so uncertain and indefinite as not to form the basis of any criminal prosecution under these counts 63

VI.

The court erred in the admission into evidence of the income tax return by each of the appellants 65

A.

There was no proper foundation laid for their admission, nor was any connection shown 65

B.

Title 26, Section 55, U. S. Codes, inherently and as construed and applied in this case and the Regulations issued pursuant thereto are unconstitutional in that they violate the defendants' rights under the Fourth and Fifth Amendments to the Constitution of the United States 66

Errors of the court on admitting income tax statements 68

VII.

The trial court erred in admitting statements made to the agents for the Bureau of Internal Revenue 69

VIII.

The court erred in the admission of Exhibits 10 and 11 in which the testimony of Samuel Namson was given 71

IX.

The court erred in admitting hearsay evidence as foundation for books and records 75

TABLE OF AUTHORITIES CITED

Cases.	PAGE
Albrecht v. United States, 273 U. S. 1	24
Bain, Ex parte, 121 U. S. 1	24, 25, 41
Batchelor v. United States, 156 U. S. 426, 39 L. Ed. 478	40
Brown v. United States, 150 U. S. 93	55
Brown v. Walker, 161 U. S. 591, 40 L. Ed. 819	67
Capone v. United States, 51 F. 2d 609	38
Carney v. United States, 163 F. 2d 784	24, 25, 26, 41, 44
Chambers v. Florida, 309 U. S. 227, 84 L. Ed. 716	90
Counselman v. Hitchcock, 142 U. S. 547, 35 L. Ed. 1110	67, 68
Dahley v. United States, 50 F. 2d 37	53
Defense Supplies Corporation v. Lawrence Warehouse Corporation, 93 L. Ed.	48
De Jonge v. Oregon, 299 U. S. 353, 81 L. Ed. 278	34, 40, 41, 48, 86
Edgerton v. United States, 143 F. 2d 697	24, 25
Evaporated Milk Association v. Roche, 130 F. 2d 843	24, 26
Feldman v. United States, 322 U. S. 487	67, 68
Fiswick v. United States, 329 U. S. 211	55
Foster v. United States, 253 Fed. 481	50
Glasser v. United States, 315 U. S. 60, 86 L. Ed. 680	50
Graham v. United States, 115 F. 2d 740	55
Greenbaum v. United States, 80 F. 2d 113	65, 71
Grimsley v. United States, 50 F. 2d 509	41
Hoffman v. Palmer, 129 F. 2d 976; affd., 318 U. S. 109, 87 L. Ed. 645, 63 Sup. Ct. 477; rehg. den., 318 U. S. 800, 87 L. Ed. 1163, 63 Sup. Ct. 757	77
Krulewitch v. United States, 17 Law Weekly 4273	55, 66, 69
Lisenba v. California, 315 U. S. 826, 86 L. Ed. 1222	90
M. Kraus & Bros. v. United States, 327 U. S. 614, 90 L. Ed. 894	34, 35, 37, 38, 63, 64

PAGE

Miller v. United States, 288 Fed. 817 50

Monia v. United States, 317 U. S. 424 ..... 67, 68

Moore v. United States, 160 U. S. 268 41

New York Life Ins. Co. v. Taylor, 147 F. 2d 297 76

Partson v. United States, 20 F. 2d 127 41

People v. Dye, 119 Cal. App. 262 90

Potter v. United States, 155 U. S. 438, 39 L. Ed. 214 ..... 37, 43, 44

Samuels v. United States, 169 F. 2d 789 ..... 41, 86, 87, 88

Shulten v. United States, 257 Fed. 724 41

Skelley v. United States, 37 F. 2d 127 41

Sutton v. United States, 157 F. 2d 661 ..... 41, 42

Sykes v. United States, 204 Fed. 909 53

United States v. Cohen, 270 U. S. 339, 70 L. Ed. 616 40

United States v. Cruikshank, 92 U. S. 542 ..... 34, 35, 40, 41, 42, 49

United States v. Crummer, 151 F. 2d 958 44

United States v. Durst, 59 Fed. Supp. 891 44

United States v. Enoch L. Johnson, No. 384-X, 39 Fed. Supp. 965 25

United States v. Ferranti, 59 Fed. Supp. 1003 ..... 43, 44

United States v. Hess, 124 U. S. 483, 31 L. Ed. 516 49

United States v. Hutchinson, 312 U. S. 219 ..... 38, 39

United States v. Interstate Properties, 153 F. 2d 469 44

United States v. Johnson, 123 F. 2d 111 ..... 22, 23, 26

United States v. Maria, 15 L. Ed. 531 37

United States v. McKay, 45 Fed. Supp. 1007 25

United States v. Quick, 128 F. 2d 832 ..... 77, 79

Viereck v. United States, 318 U. S. 236, 87 L. Ed. 734 ..... 36, 41

Williams v. United States, 168 U. S. 382 38

STATUTES PAGE

Act of July 25, 1946, Chap. 671, Secs. 17, 18 (60 Stat. 678)..... 45
Emergency Price Control Act of 1942 (50 U. S. C., App., Sec. 925) 1
Emergency Price Control Act of 1942 (56 Stat. 23, Chap. 26) 4, 10
Emergency Price Control Act of 1942 (7 F. R. 10381).....11, 29
Inflation Control Act of October 2, 1942 (56 Stats. 765, Chap. 578) 4, 10, 47
Judicial Code, Sec. 284 (Sec. 421), as amended April 17, 1940, Chap. 101, 54 Stat. 110..... 23
Maximum Price Regulation (7 F. R. 4653, 4798).....10, 35
Maximum Price Regulation 148.....27, 59, 72, 86
Maximum Price Regulation 239.....27, 59, 72, 86
Maximum Price Regulation 169.....10, 11, 20, 27, 28, 29, 30 35, 40, 52, 58, 59, 72, 86
Revised Maximum Price Regulation, Sec. 1364.407.....58, 61, 63
Rules of Criminal Procedure (New), Rule 7, Subd. (f)..... 50
Stabilization Act of 1944 (Chap. 325, Title I, Sec. 101, 58 Stats. 632, amended June 30, 1945 (Chap. 214, Sec. I, 59 Stats. 306) 47
56 Statutes at Large, p. 767, as amended June 30, 1944 (Chap. 203, 58 Stats. 648)..... 47
60 Statutes at Large, p. 23..... 28
Treasury Regulations TD 4945, Secs. 463D4, 463D5; TD 4929, Secs. 463C34, 463C36, 463C37, 463C35, 45831, 45833, 45834, 45838, 45839, 45890 and 45864..... 67
United States Code, Title 26, Sec. 54..... 66
United States Code, Title 26, Sec. 55.....14, 18, 67, 69
United States Code, Title 26, Sec. 55(i).....69, 70
United States Code, Title 26, Sec. 55(j)..... 8
United States Code, Title 28, Sec. 225..... 1
United States Code, Title 28, Sec. 695.....7, 19, 70, 72, 74, 76

PAGE

United States Code, Title 28, Sec. 879 26
United States Code, Title 28, Sec. 1254(1) 1
United States Constitution, Fourth Amendment 14, 18
United States Constitution, Fifth Amendment 8, 14, 16, 18, 66, 67, 68
United States Constitution, Sixth Amendment 14, 34, 35, 41, 42, 50

TEXTBOOKS

7 Federal Register, p. 653 28
11 Federal Register, p. 4156 5

TABLE OF AUTHORITIES CITED IN APPENDIX

STATUTES

PAGE

Maximum Price Regulation 169 (7 F. R. 4653) 9
Judicial Code, Sec. 284 1
United States Code, Title 18, Sec. 88 (1946 Ed.) 5
United States Code, Title 26, Sec. 55 ..... 2, 3
United States Code, Title 28, Sec. 421 1
United States Code, Title 28, Sec. 695 4
United States Code, Title 50, App., Sec. 901(b) 5
United States Code, Title 50, App., Sec. 902(a) 5
United States Code, Title 50, App., Sec. 904(a) 8
United States Code, Title 50, App., Sec. 925(b) 8
United States Constitution, Fifth Amendment 1

No. 11381

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

HYMAN STILLMAN and LOU SEGAL,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

OPENING BRIEF ON APPEAL.

To the Honorable Chief Judge William Denman, and to the Honorable Associate Judges of the United States Court of Appeals for the Ninth Circuit:

Jurisdiction.

Jurisdiction is conferred by Title 28, Section 225, U. S. Code (1946), and by the New Judicial Code, Title 28, Section 1254(1), and by the Emergency Price Control Act of 1942, and Regulations thereunder and the Emergency Price Control Act of 1942, as amended, Title 50 App., Section 925.

Constitutional provisions, statutes and regulations involved are in the Appendix.

Short Statement of the Facts.

On March 11, 1946, a grand jury, sitting in the Southern District of California, returned an indictment, No. 18366, against the appellants and the Southern California Meat Company, Inc., and Charles M. King, charging alleged violations "under the Emergency Price Control Act of 1942 and Maximum Price Regulations No. 148, 165, 169 and 239 thereunder."

The Grand Jury alleged:

> "The Grand Jurors of the United States of America, being duly impanelled, sworn and charged in the District Court for the Southern District of California, Central Division, in the September, *1945,* Term of this Court, having begun but not finished during the said September Term of Court, among other things the matter of the investigations charged in this indictment, and having continued to sit by order of this Court in and for the said District during the February, *1945,* Term to complete inquiries begun, but not finished, at the original term, and inquiring for that District, upon their oaths find and present as follows:" [R. 2-3.]

Two and three grand juries sit during a term in Los Angeles. At the outset of the case, objection was made to the jurisdiction of the Court to proceed under the indictment because the grand jury indictment showed no jurisdiction in the grand jury, the date therein being faulty. The objection to the indictment was considered on its merits and denied by the Court. [R. 86, 87.]

Count One of the indictment charged a conspiracy under the "Emergency Price Control Act of 1942 and Maximum Price Regulations Nos. 148, 165, 169 and 239 there-

under." [R. 3.] The alleged conspiracy was to charges for slaughtering services, alleged overcharges and alleged false entries on the records and alleged acts in relation to each of these matters. It will be noted that the allegations related to the Emergency Price Control Act of 1942 and Maximum Price Regulations thereunder, and not to the Statute, *as amended,* nor to any *Revised* Maximum Price Regulations under the amended statute. [R. 3-6.]

In furtherance of the alleged conspiracy, to effectuate its purposes, overt acts a. to r. are alleged. These relate to a charge for slaughtering services, and to the issuance of certain invoices and to the receipt of certain sums of money from H. N. Sample.

H. N. Sample never testified and no evidence was presented on the matter of the receipt of any moneys for slaughtering services, nor in proof of a single overt act alleged in the conspiracy charge in furtherance of the alleged conspiracy or to effectuate its objects.

While fifty counts were charged in the indictment, twenty-seven were withdrawn and statements made that no proof would be offered on them.

Counts 2, 3, 4, 5, 6, 45, 46, 47, 48, 49 and 50 alleged over-charges under the Emergency Price Control Act and Regulations thereunder. The only persons who testified to alleged overcharges were dealers in meat who said that they paid side money and could not specify with particularity how much they paid on any particular purchase, and who themselves in some instances said they passed the amounts paid on to the customer and were themselves not being prosecuted.

Counts 12, 13, 32, 37, 38, 39, 40, 41, 42, 43, and 44 charged the making of false entry on a document *required*

by the Act or Regulations to be kept by the seller. Of these counts, counts 12, 13, 37, 40, 41, 42, 43 and 44 charged false entry on an invoice; count 32 on a ledger, and counts 38 and 39 on a statement. There was no evidence whatever presented that these were records being kept under the requirements of the Act, or that other records were not kept accurately as required by the Act; nor did the Court instruct the jury that invoices, ledgers or statements were within the regulation or statute, as documents required to be kept; nor was there any evidence as to just what was required under the statute or regulation.

The Emergency Price Control Act of 1942 was passed in 1942 (56 Stat. 23), and Maximum Price Regulation 169, which relates to beef and veal carcasses was issued in July of 1942. This did not fix any particular price but froze the prices of meat pursuant to the highest prices charged by particular dealers themselves in a given base period in March of 1941 at its highest level.

This indictment charged a violation of this Regulation under the then existing statute. The Regulation itself was revised several times and finally it was repealed by the Administrator himself in December of 1942. The statute also was amended several times. In October of 1942, the Emergency Price Control Act was first amended by the Inflation Control Act of October 2, 1942 (56 Stat. 765, c. 578). On June 30, 1943, the Emergency Price Control Act of 1942 was amended by Congress and extended for a year. It was thereafter known as the Emergency Price Control Act of 1942, *as amended.* Both Congress and the Administrator referred to it as such. New regulations were issued under it and were called Revised

Maximum Price Regulations. There were at least seventy revisions of the Regulation up to the time of trial.[1]

The trial nevertheless continued into July of 1946. Objection, made to the jurisdiction of the Court to proceed was overruled, and on July 2nd, the Court permitted the jury to return a verdict and on July 5, 1946, the Court pronounced judgment, over objection that it was without jurisdiction to do so by reason of the termination of both statute and regulations.

The case was tried on the charge that the statute alleged was the Emergency Price Control Act of 1942, but the Court instructed the jury under the act both with and without the provisions of the act "as amended." It gave instructions on Revised Regulations thereunder—not on the specific allegations in the indictment which only referred to the "Emergency Price Control Act of 1942" and "the Maximum Price Regulation *thereunder.*"

William Muehlberger testified to buying meat from Hyman Stillman in 1944 [R. 88] and paying five cents over [R. 90] at a time subsequent to the delivery of the meat. [R. 99.] He kept no record nor was he ever cited for prosecution by the O. P. A. [R. 103.]

---

[1]By April 16, 1946, 11 F. R. 4156, there had been a seventieth revision or amendment to the regulations issued subsequent to the *Revised* Regulation of December 16, 1942.

All of these Regulations refer to the Emergency Price Control Act of 1942, *as amended* and to the Regulations as "revised." We assume these were not idle or unnecessary words.

On June 30, 1946, all Emergency Price Control Statutes as amended and all Regulations and revised Regulations terminated by the failure of Congress to re-enact. The Price Control Extension Act of 1946 specifically exempted meat from its operation. Congress repeatedly referred to the prior statutes as "amended."

Aside from these two purchases, not a single other person testified to having made any purchases from Mr. Stillman at any over-ceiling prices.

The other witnesses testified to making purchases from Mr. Segal.

No corroboration, no confession or other competent evidence was introduced to tie up Mr. Stillman with these specific transactions.

A purported statement given to Internal Revenue Agents from Mr. Segal and offered in support of the Government's case was to the effect that Mr. Stillman knew nothing about the transactions and did not participate in them, and the moneys which he, Mr. Segal, collected.

In support of the alleged false entry counts the Government offered no evidence whatsoever to show that books and records were kept by the defendants for the purposes of the regulations or show that there were no other books and records kept for the purposes of the regulations. The Government introduced invoices given to customers but these were not shown to be the documents required by the act or regulation to be kept by the seller, nor was there any showing as to who made out the particular invoice, nor was there any foundation laid for a proper introduction into evidence. Motions to strike were denied. [R. 304.]

There was also a ledger book introduced into evidence over objections that it was hearsay, and incompetent and without foundation. [R. 297-299.] This book contained the type of entries which it is apparent the regulations were not designed to have the seller of products keep under the regulation, and the ledger was not such a book as required to be kept. Nor was there any foundation

laid for the entry of the book; it was not shown to have been kept in the due and regular course of business, nor that it was a record ordinarily kept, and it was not shown that it was an accurate record of the matters ordinarily kept in the course of business. (Title 28, Sec. 695, U. S. C.)

In one ledger there was a change made on the ledger, because a co-partner stated that it was *not* kept in the regular course of business. The entry made in the accountant's office was not an entry customarily made in the due course of business. No foundation for proof of its contents as required by Title 28, Section 695, U. S. Code, was laid.

The Court also admitted in evidence a *statement* to a customer. (Counts 38 and 39.) These ordinarily are not kept by the seller. They were prepared for and given to the buyer as a statement of the sum due. There was no evidence that these were records required to be kept by the statute and regulations.

During the course of the trial, over objections of the defendant, the Court admitted the testimony of one Samuel Namson regarding Exhibits 10, 11, 39a, b and c, and refused to strike the same on the ground that it was *irrelevant* to any of the issues in the case and that it was without foundation. Namson was an accountant representing a co-partner. He was trying to have ledger entries reflect a profit instead of a loss.

The Court also admitted, over objection, the typewritten income tax return of each of the appellants. These were objected to as being without foundation and as incompetent. They were also objected to as in violation of the constitutional and statutory rights of the appellants and

as invading the appellant's rights under the Fifth Amendment to the Constitution of the United States.

The Court also admitted a *statement* to Internal Revenue Agents of the appellant Segal as counter-distinguished from the return of the defendant Segal. It was general in its nature, related to no particular transaction. This was a statement taken long after the conclusion of the transactions on which the appellant Segal was attempting to make a voluntary disclosure to the Bureau of Internal Revenue. Title 26, Section 55J makes such *statements* confidential and does not permit *statements* to be made public.

The use of the statement was also objected to as violating the Constitutional rights of the appellants under the Fifth Amendment to the Constitution of the United States. The Court overruled the objection.

One of the income tax statements admitted in evidence, that of Lou Segal, was not only typewritten but was prepared by an income tax man named Efron. It merely shows a signature, purporting to be a signature of a Lou A. Segal. No evidence was offered to show that the Lou A. Segal was the Lou A. Segal on trial.

The data contained in the statement is all typewritten. The income tax statement purporting to be signed by Hyman Stillman is also a typewritten return. Both returns were admitted in evidence over the objections of the appellants, and motions to strike were denied.

These statements and the returns were entirely hearsay and incompetent to prove their contents and were hearsay and clearly inadmissible.

In spite of the fact that the indictment charged violation of the "Emergency Price Regulation of 1942 and Maximum Price Regulation 169 thereunder" no particu-

lar price was alleged in the indictment constituting an alleged violation. The Court declined on motion at the outset of the trial to give the appellants a bill of particulars specifying the Regulation as well as the claimed statutory provisions which the appellants were accused of violating or the price which allegedly was in violation. There were at least seventy revised regulations under the amended statutes.

The Court instructed the jury alternately both under the old statute and the new. It gave prices as though the indictment charged the statute as amended and under revised regulations, which were inapplicable to the statute as it existed. In various charges to the jury, the Court erroneously said the prices referred to were under the Emergency Price Control Act of 1942, *as amended,* and (Revised) Regulations thereunder. [R. 355, 361, 362, 369.]

The Court also instructed the jury that termination of the statute as well as the regulations could not affect the prosecution.

It also failed to tell the jury that Exhibit 39(a) (b), and (c) which were withdrawn in the absence of the jury by the Government after the exhibits had been admitted in evidence, had been withdrawn and stricken. Motions to strike this evidence commenced at page 310. They were made in the absence of the jury. At page 321, the Government said it was withdrawing these exhibits. However, when the jury returned the Court did not inform them then nor in its instructions, nor at any time to disregard this particular evidence which was withdrawn in its absence. It was highly prejudicial. The incompetent and improper evidence remained for the jury's consideration.

Summary of the Argument.

I.

The indictment on its face shows that it is void for want of jurisdiction. The jurisdictional statement of the Grand Jury in the indictment as authority for the Grand Jury's existence shows that it was without legal authority to act. The entire proceedings were, therefore, null and void because of the invalidity of the indictment.

II.

The indictment was brought under the Emergency Price Control Act of 1942 (56 Stat. 23, ch. 26) and the Regulations issued thereunder. 7 F. R. 4653. The Emergency Price Control Act of 1942 was adopted January 30, 1942 (56 Stats. 23, ch. 26), it was amended by the Inflation Control Act of October 2, 1942 (56 Stats. 765, ch. 578), and thereafter was referred to NOT as "The Emergency Price Control Act of 1942" but as the "Emergency Price Control Act of 1942, *as amended.*" It was amended June 30, 1943, the Stabilization Act of 1944, followed it.

Maximum Price Regulation 169, which was issued under the Emergency Price Control Act of 1942 did not set any dollars and cents price for the maximum prices, but froze meat prices at the highest prices charged by the meat dealers themselves between certain specific dates, to-wit: March 16 to March 28, 1942.

(See Maximum Price Regulation, 7 Fed. Register 4653, 4798.)

Thereafter the Maximum Price Regulation 169 was repeatedly amended. On December 12, 1942, the Administrator revoked Maximum Price Regulation 169 as issued under the Emergency Price Control Act of 1942 (7 Fed.

Register 10381). Thereafter, he issued Revised Maximum Price Regulations based upon new questions and diffierent methods of fixing prices.

The Emergency Price Control Act of 1942 was thereafter amended again in 1943 and 1944. And, in 1944 the Act was called the Stabilization Act of 1944.

Maximum Price Regulation 169 had ceased to exist, having been fully revoked prior to any of the alleged acts charged hereunder and the statute had been and was changed prior to any of the acts charged hereunder, and the statutes relating to the Emergency Price Controls were out of existence at the time judgment was pronounced in this case.

The attempt to pronounce judgment after the termination of the statute, as well as regulations, was a nullity. The court was without jurisdiction to proceed.

The Maximum Price Regulation under the Emergency Price Control Act of 1942 had been out of existence for more than three and one-half years at the time the judgment was pronounced and the statute itself was out of existence as well, and had been amended several times.

The judgments were therefore null and void and judgments should have been arrested because of the repeal of both the Regulations and the termination of the Statute.

The attempt to sustain the case on the theory of the statute *as amended* and under regulations as repeatedly revised subsequent thereto was without due process of law guaranteed by the Fifth Amendment and a nullity.

III.

The verdicts were contrary to the law and the evidence.

(a) There was no proof of any conspiracy to violate the Emergency Price Control Act of 1942, which had expired and under which there were no existing regulations.

(b) There was no proof of any conspiracy or unlawful agreement. No proof of a single civil act alleged in furtherance of such agreement. There was no substantial proof of any substantive offenses as charged in the indictment.

(c) Men do not become conspirators because they are partners in business. The acceptance of any moneys as gifts or gratuities by one did not constitute a conspiracy on the part of another because he was a business partner.

(d) The evidence is wholly lacking as against each of the defendants regarding transactions alleged with the other defendant. Only two transactions relate to Stillman. All the others relate only to Segal.

The evidence is entirely silent that any invoices, books, records or other exhibits were being kept pursuant to any other statute or regulations or that they were false records kept for other purposes. There was no proof either defendant made or caused these records to be made.

The statute and regulations are vague and indefinite as to what records should be kept.

IV.

The District Court erred in the admission and exclusion of evidence in the case. There was no foundation for the books, records or invoices. Also they were clearly hearsay.

The District Court also erred in the admission into evidence of a book of records examined by a witness named Samuel Namson. It was not shown that the book and record was a book regularly used in the course of business or that it reflected the records of the business truthfully, or at a time at or near the transaction. In fact, it was the Government's evidence that the book entry was not made at or near the transaction and that it was not kept in the regular course of business. Therefore, it was error to admit this testimony.

V.

The District Court erred in the admission of testimony of invoices received of various witnesses without a proper foundation that they were a true and accurate copy of the invoices of the transactions and accurately reflected the facts therein set out, or that they were records kept to reflect OPA prices.

VI.

The District Court erred in admitting statements taken by Revenue Agents to be placed in evidence where those *statements* were not returns and were taken separate and apart from income tax returns and were made under the compulsion of the Internal Revenue Code.

Such statements about returns are not public records, and the federal agents who disclosed the same are liable to punishment. It is only income tax *returns* issued pursuant to the authority of the President and the Secretary of the Treasury that are made *public records* and are only such when requested under proper authority, and for uses authorized by statute.

There is no authority to use these returns in prosecutions of offenses not related to the Internal Revenue. *Statements* likewise are not returns and are not permitted to be disclosed.

Such statements are given under compulsion of law and therefore inherently and as construed and applied by the trial court, Title 26, Section 55, U. S. Codes, if construed to give that power and authority is in violation of the Fourth and Fifth Amendments to the Constitution of the United States.

The District Court, over objections, admitted the statements of federal revenue agents, which constituted compelled testimony—the use of which is forbidden by the Fourth and Fifth Amendments to the Constitution of the United States.

VII.

The trial court overruled the Motion to Dismiss the Indictment on the ground it was indefinite and uncertain and violated the Sixth Amendment to the Constitution of the United States in failing to set forth the nature and cause of the accusations and facts sufficient for the defendants to be prepared to meet their defense.

In this respect the District Court also denied a Bill of Particulars requesting the specific statute and regulation and the specific acts which appellants were charged with violating.

In this respect, it is contended that the trial court erred as well as violated the defendant's constitutional rights under the Sixth Amendment to the Constitution of the United States.

VIII.

The District Court also erred in holding that it had jurisdiction to pronounce judgment after the statute had expired and the regulation thereunder had been repealed and ended.

IX.

In the cross-examination of certain witnesses, the District Court restricted the examination unduly.

X.

The District Court Judge, in charging the jury, told the jury that he instructed them under the Emergency Price Control Act of 1942. Then he told them it was under the Emergency Price Control Act *as amended,* not under the Emergency Price Control Act of 1942 as charged in the indictment without amendment. He told the jury that the Maximum Price Regulations were as he gave them in his instruction, contrary to the express allegations of the indictment that the charge was a violation of the Emergency Price Control Act of 1942 and the Maximum Price Regulations thereunder which contained no specific prices and which were non-existent under the Emergency Price Control Act of 1942.

Thus the trial court, by his instruction, attempted to amend the indictment and to instruct the jury to consider the charge differently from the express allegations of the indictment.

XI.

The District Court erred in refusing an instruction as to gifts.

XII.

The District Court erred.

Specification of Errors.

Questions presented by this appeal:

I.

The indictment was void because it alleged on its face that it was not brought by a legally constituted and then existing Grand Jury.

The District Court erred in not dismissing the indictment and in not quashing the same.

The solemn declaration of the Grand Jury, in its indictment, cannot be amended or altered, and a trial on an illegal indictment is a nullity.

II.

The regulations alleged to have been violated had been revoked and the statute under which the regulations were allegedly promulgated were terminated prior to the alleged offense in the indictment. The defendants were, therefore, tried on a charge not made and without any existing statutes or regulations. The trial and the judgment were therefore both a nullity and violated due process of law guaranteed by the Fifth Amendment to the Constitution of the United States.

All the statutes and regulations relating to meat had terminated prior to the close of the prosecution. The proceedings thereafter were a nullity.

III.

The District Court erred in denying a Bill of Particulars as to the particular statute and regulation allegedly violated where the indictment alleged one statute and regulation and the government was going to proceed on another statute and revised regulation. Such a Bill of Par-

ticulars would have enabled the defendant to know at the outset of the case what he had to meet and that the prices thus set out were not prices within the Emergency Price Control Act of 1942, and the maximum price regulation thereunder, which at that time was a price that had been fixed by the dealer at a base period and frozen; nor one fixed by the OPA.

IV.

The evidence was entirely insufficient to justify the verdicts. The verdicts were contrary to the law and the evidence. There was no evidence that the appellants had violated the Emergency Price Control Act of 1942, or any regulations issued thereunder, these having terminated long before.

There was no independent proof of any conspiracy between the defendants.

Only one witness testified; and only to two acts of Stillman. All the rest related solely to Segal.

There was no proof that any books, records or papers were being kept for the purposes of the statute, or that others were not correctly kept.

V.

The District Court erred in the admission and exclusion of evidence in the case. The District Court, over objection, admitted the typewritten income tax returns, allegedly those of the appellants, to be offered in evidence without foundation or proof of its contents. Segal's return was prepared by Jack Effron. There was no proof as to its correctness. It was hearsay, and incompetent. And in ad-

dition to the income tax return, the Court admitted in evidence the testimony of Donald Oliver Bircher regarding an alleged voluntary statement of appellant Segal to the Bureau of Internal Revenue. Statutes forbid the disclosure of any *statement* made to Internal Revenue agents, as distinguished from *returns* themselves. Both the statements and returns were too vague and general and related to no particular transaction charged in the indictment. They should not have been admitted.

VI.

The District Court erred in holding that Title 26, Section 55, United States Code, and any regulations issued pursuant thereto, inherently and as construed and applied in this case, do not violate the defendants' rights under the Fourth and Fifth Amendments to the Constitution of the United States, and did not deny due process of law to each of them as guaranteed by the Fifth Amendment. Title 26 compels *statements* to be made without granting constitutional immunity for doing so. The admission in evidence of statements taken by law under a statutory provision that they are confidential, and which statements constituted compelled testimony, is forbidden by the Fourth and Fifth Amendments to the Constitution of the United States.

VII.

The District Court erred in the admission over objections of books, records and entries without proof of any foundation and because they were hearsay, irrelevant, incompetent and immaterial.

VIII.

The District Court erred in admitting testimony of Samuel J. Phoebus, over objections, as to certain entries in certain book records examined by him in his investigation. This was hearsay and incompetent proof. The Court also erred in failing to instruct the jury that the records had been withdrawn from the consideration of the jury in their absence, and erred by permitting the jury to see them.

IX.

The District Court erred in admitting the invoices of sales as to proof of any act or fact, and in failing to strike them as being without foundation.

X.

The Court erred in failing to strike the testimony of Samuel Namson on motion made. It was irrelevant. There was no foundation under Title 28, Section 695, for the introduction of Exhibits 10 and 11. The testimony showed that the books were not kept in the regular course of business and failed to show that it was the regular custom to keep these particular books. The change in the books was not made in the regular course of business and was to show correction for tax purposes.

The Court also erred in admitting in evidence Exhibits 39 a, b, and c, and evidence regarding them and in failing to instruct the jury that 39 a, b, and c, were withdrawn.

XI.

The statute and regulations were both too vague and indefinite as to what was required to be kept to form the basis of any prosecution on a charge of false entry.

XII.

The Court erred in the instructions given (a) that the prosecution was under the Emergency Price Control Act *as amended* and (revised) regulations thereunder, and (b) that termination of the statute and regulations do not terminate the prosecution.

XIII.

The Court erred in instructing the jury under the Emergency Price Control Act of 1942, *as amended,* and in setting out maximum price regulation 169, not as it was issued, but as revised several times and under different statutes.

XIV.

The Court should have granted the motions for judgments and acquittal.

XV.

The Court should have granted the motions in arrest of judgment.

ARGUMENT.

I.

The Indictment Was Invalid.

The indictment was void on its face. The indictment was returned March 11, 1946 [R. 2.] The indictment alleges:

> "Grand Jurors of the United States of America, being duly impaneled, sworn and charged in the District Court for the Southern District of California, Central Division in the *September, 1945,* Term of this Court, among other things, the matter of the investigations charged in this indictment, and having continued to sit by the order of this Court in and for the said District during the *February, 1945 Term* to complete inquiries *begun, but not finished, at the original term,* and inquiring for that District, upon their oaths find and present as follows:" (Emphasis ours.)

The indictment was presented on oath of the grand jury as a true and correct copy of the indictment and was signed,

> "A true bill. John D. Boyle, Foreman." [R. 126.]

It was filed March 11, 1946. This was long after the term of court in February, 1945, and the power and authority of the grand jury under its own oath had expired. The indictment was therefore void. Objection was made to the indictment on account of the fact that it was brought after the term of court in which it was lawfully constituted. [R. 86.] The Court overruled the objections and allowed an exception to the defendants. [R. 87.] It was conceded during oral argument that two grand juries sit in Los Angeles County.

Here we have a solemn allegation by the Grand Jury which in its essence is a jurisdictional statement of the Grand Jury as to its authority to act. On its face, the *jurisdictional statement* of the Grand Jury shows that it was without authority to act.

In *United States v. Johnson,* 123 F. 2d 111, at 117, the Court, at page 118, said as follows:

> "No question is raised by the Government but that compliance with the provision is essential in order to give a Grand Jury vitality subsequent to the term at which it is originally empaneled. Moreover, in view of the fact that all inferior courts of the United States are of limited jurisdiction and possess only such power and authority as are expressly conferred, no question could well be raised in this respect. As was said in *Re* Mills, Petitioner, 135 U. S. 263, 267, 10 S. Ct. 762, 763, 34 L. Ed. 107: '* * * A grand jury, by which presentments or indictments may be made for offenses against the United States is a creature of statute. It cannot be impaneled by a court of the United States by virtue simply of its organization as a judicial tribunal. * * *'
>
> "If a court is without authority to impanel a Grand Jury except as the same is expressly conferred by Statute, it would seem to follow inevitably that a Grand Jury impaneled could only have its authority or power continued to a subsequent term by strict compliance with the statutory provision. The language of the provision plainly limits the authority of the court to continue a Grand Jury to sit 'during the term succeeding the term at which the request is made,' and with equal clarity limits the continuance 'solely to finish investigations begun but not finished by such grand jury.' "

Section 421 (Jud. Code, Sec. 284), as amended April 17, 1940, Ch. 101, 54 Stat. 110, provides as follows:

> "* * * The district court may in term order a grand jury to be summoned at such time, and to serve such time as it may direct, whenever, in its judgment, it may be proper to do so. A district judge may, upon request of the district attorney or of the grand jury or on his own motion, by order authorize any grand jury to continue to sit during the term succeeding the term at which such request is made, solely to finish investigations begun but not finished by such grand jury, but no grand jury shall be permitted to sit in all during more than eighteen months:" etc.

Implicit in the decision of *United States v. Johnson, supra,* is the holding that the indictment must be returned by a Grand Jury having statutory authority and that *the language of the indictment controls the Court in the authority of the Grand Jury to act.*

In the *Johnson* case, 319 U. S. 503, 87 L. Ed. 1546, at 1554-1555, the Court said:

> "The indictment itself alleged that the grand jury 'having begun but not finished during said December Term . . . an investigation of the matters charged in this indictment, and having continued to sit by order of this court . . . during the February and March terms . . . for the purpose of finishing investigations begun but not finished during said December Term.' The court below was apparently of the view that a mere denial *of such a solemn allegation by the grand jury puts its truth in issue*, that the burden is upon the government 'to support it with proof.'"

Our situation is the reverse. The indictment itself makes a solemn allegation by the very language of which it would *lack jurisdiction to act.* The indictment was returned as a *"True Bill."* There is no authority to proceed under it as alleged. The Court must look to the indictment itself and its four corners, like a will, to determine its validity. Absent an essential declaration of jurisdiction it must fail. The indictment itself cannot be changed without invalidating it.

Ex parte Bain, 121 U. S. 1;

Evaporated Milk Association v. Roche, 130 F. 2d 843;

Edgerton v. U. S., 143 F. 2d 697.

If the Court had attempted to strike out the "5" from the indictment and change it to read "6" or "7", this would have vitiated the indictment.

Ex parte Bain, 121 U. S. 1;

Albrecht v. U. S., 273 U. S. 1;

Edgerton v. U. S., 143 F. 2d 697;

Evaporated Milk Association v. Roche, 130 F. 2d 843, 851;

Carney v. U. S., 163 F. 2d 784.

If, then, the Court could not strike the date or change it, the Court had no power to disregard it, and therefore the indictment was fatally defective in its very language. But if it be argued that this jurisdictional solemn declaration of the grand jury was such an error as might have been amended or corrected, the answer is that no such amendment or correction was proposed. The Court proceeded on the indictment as written, summarily overruling objections to it.

In *United States v. McKay,* 45 Fed. Supp. 1007, at 1015, the Court said:

> "A United States District Court is one of limited jurisdiction with only such powers as are expressly conferred by statute. The grand jury sitting in such a court is strictly a creature of statute. *In re* Mills, Petitioner, 135 U. S. 263, 267, 10 S. Ct. 762, 34 L. Ed. 107. There is no such thing as a *de facto* grand jury in a Federal Court. Its original life and authority to act, and any continued existence which it may have after the expiration of the term for which it was impaneled, depends strictly upon statutory authority, and unless that authority is complied with there is no jurisdiction to return an indictment."

If the indictment on its face alleges lack of statutory authority there is no jurisdiction to proceed.

In *United States v. Enoch L. Johnson,* No. 384-X, the Third Circuit on June 19, 1941, quashed an indictment upon a plea in abatement on the ground that the Grand Jury was without authority. This case is reviewed in 39 Fed. Supp. 965, by Circuit Judge Maris. Since the Grand Jury's work must be regarded with all solemnity, any effort to alter the indictment must necessarily vitiate it.

This circuit has held that an indictment may not be amended in any particular. *Ex parte Bain,* 131 U. S. 1; *Edgerton v. U. S.,* 143 F. 2d 697; *Carney v. U. S.,* 163 F. 2d 784.)

An indictment, as pointed out in *U. S. v. Johnson, supra,* is a solemn allegation by the grand jury, and if an error crept in it, cannot stand, any more than could the indictment in *Carney v. U. S.*, No. 11001, of this circuit.

In *Evaporated Milk Association v. Roche,* 130 F. 2d 843, this Court, in this circuit, considered the question of the expiration of the Grand Jury and held that the issue was jurisdictional within the meaning of Title 28, Section 879.

While the Supreme Court of the United States considered the *Roche* case as to the power of this Court to issue mandamus, the question of the authority of the Grand Jury and its power to sit beyond or within the term was not determined.

In *United States v. Carney,* No. 11001, of this circuit, this Court held that "the court is without power to strike a figure or letter from the indictment."

But, even if it be argued that the Court could do so, it was not done in this case and this court must consider the indictment as it appears on its face.

Furthermore, as pointed out in the oral argument on this case, two and three grand juries sit during a term. The indictment itself was therefore a nullity, and the Court should have sustained the objections made by defense counsel, and which the Court considered on its merits and to which it allowed an exception. [R. 86, 87.]

II.

The Termination of the Statute and the Revocation of the Regulations Thereunder Ended Any Possibility of Any Prosecution.

There Was No Charge Upon Which the Appellants Were Duly Tried Under the Indictment and the Proceedings Were Therefore in Violation of Due Process of Law Guaranteed by the Fifth Amendment.

To arrive at a clear understanding of this point, we must revert both to the Statutes, the regulations thereunder, as alleged in the indictment, the amended statute and revised regulations thereunder.

The indictment in each count charged a violation of the "Emergency Price Control Act of 1942" and "Maximum Price Regulation 148, 165, 169 and 239 *thereunder.*" [R. 3, 4, 5, 6.]

As to each substantive count, relating to alleged overcharges, the language was as follows:

> "The defendants sold meat, for a price per pound which was, . . . in excess of the maximum price for said meat items permitted under the said Emergency Price Control Act of *1942* and Maximum Price Regulation No. 169 *thereunder.*" [R. 9.]

Each of the counts regarding meat prices used similar language. Other counts charged violation of the same statute and regulations relating to entries required to be kept in a book or record for the purpose of the statute. Each count thus charged a violation of the Emergency Price Control Act of 1942 and Maximum Price Regulation 169 thereunder, and in some cases, in addition to Regulation 169, Regulations 148 and 239. The principal

regulation, however, was Maximum Price Regulation *169,* relating to beef and veal carcasses.

In each instance the indictment alleged the Maximum Price Regulation 169 thereunder, that is, under the Emergency Price Control Act of 1942.

The Emergency Price Control Act of 1942, by its terms, expired on June 30, 1943. (60 Stat. 23.)

Maximum Price Regulation 169 was promulgated July 1942 (7 F. R. 653).

The Congress required that the Administrator state the reasons and grounds for his issuance of any regulation and further that it might be challenged by any person affected thereby.

As a preamble to Regulation 169, which involved beef and veal carcasses, the Administrator said:

> "In the judgment of the Price Administrator, it is necessary and proper, in order to effectuate the purpose of the Emergency Price Control Act of 1942 to establish as the maximum prices for beef and veal carcasses and wholesale cuts the prices prevailing with respect thereto during the period March 16 to March 28, 1942."

Under the Regulation as thus issued, there were no fixed prices for beef or veal as related to all persons in the industry, but each dealer was frozen as to the prices he was allowed to fix pursuant to sub-division (i) of Regulation 169:

> "The seller shall fix a price for each such cut upon the basis of relationship which prevailed, during the base period March 16 to March 28, 1942, between the price of such cut and the prices of other cuts derived from a quater or saddle of the same grade."

Thus Regulation 169 "thereunder" as alleged in the indictment had maximum prices at a prevailing price of the seller—not a general over-all and universal price for different areas.

Several amendments, or revisions, were promulgated to Regulation 169 and the Administrator himself revoked Maximum Price Regulation 169 on December 10, 1942. (7 F. R. 10381.)

By its very terms, Emergency Price Control Act of 1942 expired June 30, 1943. An amendment was introduced extending its time for one year and the Emergency Price Control Act of 1942 was then thereafter known as *Emergency Price Control Act of 1942, as amended,* and whatever Regulations were issued by the Administrator were issued by him under the authority of the Emergency Price Control Act of 1942, *as amended,* and every revision of the regulation was issued as a Revised Maximum Price Regulation under the Emergency Price Control Act of 1942, as amended. Thus, the Administrator in reviving Maximum Price Regulation 169 said:

> "In the judgment of the Price Administrator, it is necessary and proper, in order to effectuate the purposes of the Emergency Price Control Act of 1942, *as amended,* and Executive Order No. 9250 issued by the President on October 3, 1942, to maintain as the maximum prices for processed products the prices prevailing with respect thereto during the period March 16, to March 28, 1942, inclusive, and to establish for beef carcasses and wholesale cuts specific prices slightly higher than those prevailing during such period. These prices are established as provided in §§ 1364.451, 1364.452 for beef; §§ 1364.466 and 1364.467 for veal; and §1364.476 for processed

products. The Price Administrator has ascertained and given due consideration to the price of beef and veal carcasses and wholesale cuts prevailing between October 1 and October 15, 1941, and has made adjustments for such relevant factors as he has determined and deemed to be of general applicability. So far as practicable, the Price Administrator has advised and consulted with representative members of the industry which will be affected by this regulation.

In the judgment of the Price Administrator the maximum prices established by this regulation are and will be generally fair and equitable and will effectuate the purposes of said Act and Executive Order. A statement of the considerations involved in the issuance of this regulation has been issued simultaneously herewith and has been filed with the Division of the Federal Register. . . .

Therefore, under the authority vested in the Price Administrator by the Emergency Price Control Act of 1942, as amended, and Executive Order No. 9250 and in accordance with Revised Procedural Regulation No. 1, issued by the Office of Price Administration, Revised Maximum Price Regulation No. 169 is hereby issued."

The prosecutor did not rely on the statute, as alleged in the indictment, but relied on the Amended Statute and *the Regulations issued pursuant thereto.*

The "conspiracy" count of the indictment alleges the commencement of the conspiracy on or about July 1, 1943. [R. 3.] This was one day after the Emergency Price Control Act of 1942 itself had expired and more than six months after Maximum Price Regulation 169 thereunder had been revoked by the Administrator himself,

and several new amendments or revisions had been presented.[2]

On June 30, 1946, the Emergency Price Control Act, the amendments, and the Stabilization Act of 1944 and its amendments and all regulations under any of them were all terminated.

A Motion to Terminate the prosecution which was then taking place on the ground that the Emergency Price Con-

---

[2]Count Two of the indictment alleged as follows:

"Violation of the *Emergency Price Control Act of 1942* and the Maximum Price Regulation No. 169 *thereunder*" [R. 8, 9];

Count Three—"Violation of the *Emergency Price Control Act of 1942* and Maximum Price Regulation No. 169 *thereunder*" [R. 9, 10];

Count Four—"Violation of *Emergency Price Control Act of 1942* and *Maximum* Price Regulation No. 169 *thereunder*" [R. 10];

Count Five—"Violation of *Emergency Price Control Act of 1942* and Maximum Price Regulation No. 169 *thereunder*" [R. 11];

Count Six—"Violation of the *Emergency Price Control Act of 1942* and Maximum Price Regulation No. 169 *thereunder*" [R. 11, 12];

Count 12—"Violation of *Emergency Price Control Act of 1942* and Maximum Price Regulation 169 *thereunder*" [R. 12, 13];

Count 13—"Violation of *Emergency Price Control Act of 1942* and Maximum Price Regulation 169 *thereunder*" [R. 13, 14];

Count 32—"Violation of *Emergency Price Control Act of 1942* and Maximum Price Regulations 148, 169 and 239 *thereunder*" [R. 14];

Count 37—"Violation of the *Emergency Price Control Act of 1942* and Maximum Price Regulation 169 *thereunder*" [R. 15];

Count 38—"Violation of the *Emergency Price Control Act of 1942* and Maximum Price Regulations 169 and 239 *thereunder*" [R. 15, 16];

Count 39—"Violation of the *Emergency Price Control Act of 1942* and Maximum Price Regulations 169 and 239 *thereunder*" [R. 16, 17];

trol Act under which the prosecution was brought is now automatically terminated and that the Court was without jurisdiction to proceed was denied by the Court. [R. 43, 44.]

Verdicts were not returned until July 2, 1946, and judgment was not pronounced until July 5, 1946. [R. 53-56.] No law or regulation of any kind was then in existence.

Count 40—"Violation of the *Emergency Price Control Act of 1942* and Maximum Price Regulation 169 *thereunder*" [R. 17];

Count 41—"Violation of the *Emergency Price Control Act of 1942* and Maximum Price Regulation 169 *thereunder*" [R. 18];

Count 42—"Violation of the *Emergency Price Control Act of 1942* and Maximum Price Regulation 169 *thereunder*" [R. 18, 19];

Count 43—"Violation of the *Emergency Price Control Act of 1942* and Maximum Price Regulation 169 *thereunder*" [R. 19, 20];

Count 44—"Violation of the *Emergency Price Control Act of 1942* and Maximum Price Regulation 169 *thereunder*" [R. 20];

Count 45—"Violation of the *Emergency Price Control Act of 1942* and Maximum Price Regulation No. 169 *thereunder*" [R. 21];

Count 46—"Violation of *Emergency Price Control Act of 1942* and Maximum Price Regulation No. 169 *thereunder*" [R. 22];

Count 47—"Violation of *Emergency Price Control Act of 1942* and Maximum Price Regulation No. 169 *thereunder*" [R. 22, 23];

Count 48—"Violation of the *Emergency Price Control Act of 1942* and Maximum Price Regulation No. 169 *thereunder*" [R. 23, 24];

Count 49—"Violation of the *Emergency Price Control Act of 1942* and Maximum Price Regulation No. 169 *thereunder*" [R. 24, 25];

Count 50—"Violation of the *Emergency Price Control Act of 1942* and Maximum Price Regulation No. 169 *thereunder*" [R. 25].

Congress in enacting a new law relating to Price Control Extension Act of 1946, referred to the Emergency Price Control Act of 1942 throughout *as amended,* not to the Emergency Price Control Act. Also, the new Act, *as amended*, which was enacted on July 25, 1946, specifically excepted and exempted, from any extension, any requirement relating to meat.

Therefore, all laws and regulations relating to meat had expired on June 30, 1946, and no law or regulation, under any circumstances, whether under the Act which was amended in 1943 and under revised regulations, was thereafter in any wise applicable to the appellants.

At the very outset of the trial, there was a demand for a *Bill of Particulars* in which the defendants asked for particulars as to the regulations they were charged with violating, as to the prices at which they were alleged to have sold, and as to the maximum prices which it was contended by the Government were permitted to be charged under the particular regulation alleged for the character of beef allegedly sold. The Demand for Bill of Particulars [R. 28-32] was denied. [R. 32.]

The question thus presented is WHETHER A DEFENDANT, IN A CRIMINAL ACTION, MAY BE TRIED UPON AN INDICTMENT SETTING OUT AS A FACT THAT THE PROSECUTION WAS UNDER AN EMERGENCY STATUTE, WHICH BY ITS VERY TERMS EXPIRED IN ONE YEAR, AND PURSUANT TO REGULATIONS ISSUED THEREUNDER, WHICH HAD NO APPLICATION TO THE CASE AT BAR; AND WHETHER SUCH PROCEDURE AND PROCEEDINGS ARE TOTALLY VOID AND IN VIOLATION OF DUE PROCESS OF LAW GUARANTEED BY THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES.

In *De Jonge v. Oregon,* 299 U. S. 353, 81 L. Ed. 278, it is stated:

> "Conviction upon a charge not made would be sheer denial of due process."

And, in *M. Kraus & Bros. v. United States,* 327 U. S. 614, 90 L. Ed. 894, at page 899, the Court said:

> "But patent omission and uncertainties cannot be disregarded when dealing with a criminal prosecution. A prosecutor in framing an indictment, a court in interpreting the Administrator's regulations or a jury in judging guilt cannot supply that which the Administrator failed to do by express work or fair implication. Not even the Administrator's interpretations of his own regulations can cure an omission or add certainty and definiteness to otherwise vague language. The prohibited conduct must, for criminal purposes, be set forth with clarity in the regulations and orders which he is authorized by Congress to promulgate under the Act. Congress has warned the public to look to that source alone to discover what conduct is evasive and hence likely to create criminal liability. United States v. Resnick, 299 U. S. 207, 81 L. ed. 127, 57 S. Ct. 126."

The defendants in being informed of the nature and cause of the accusation had only the indictment to look to. That indictment must of necessity set forth the nature and cause of the accusation with certainty and clarity. (*United States v. Cruickshank,* 92 U. S. 542, Sixth Amendment to the Constitution of the United States.)

Thus, the indictment alleged an offense under a statute which had actually expired and the trial had continued at a time after all statutes relating to the subject had expired, and judgment was pronounced thereafter; also, the indictment alleged a regulation which did not cover the charge on which the defendant was tried and which contained no specific ceiling or base prices on the theory of which the defendants were tried.

The Constitution has warned the defendant to look to the indictment for the nature and cause of accusation. (Sixth Amendment to the Constitution of the United States, also *U. S. v. Cruickshank,* 92 U. S. 542, 23 L. Ed. 588.) It has also told the defendant to look to regulations and orders issued pursuant to statutes, both of which must be set forth with clarity and certainty. (*M. Kraus & Bros. v. United States,* 327 U. S. 622, 90 L. Ed. 899.)

Looking at the indictment, therefore, the accused is told that he is violating the Emergency Price Control Act of 1942 and violating Maximum Price Regulation No. 169 thereunder. Thus, he is directed to look for his alleged violation of law to the Act between 1942 and 1943 and to the Maximum Price Regulation thereunder, No. 169, which was published in 7 Federal Register 4653.

We submit that the indictment as it thus proceeded was a total nullity, and that the Court was without jurisdiction to proceed.

The trial Court, recognizing partly the situation, thus attempted to instruct the jury that "I now instruct you that under the Emergency Price Control Act of 1942, *as amended.*" [R. 362.] Again he charged them: "Under the Emergency Price Control Act of 1942, *as amended,* a person is prohibited from wilfully making or causing another to make any false statement or entry in any document or record required to be kept under that law or regulation issued under it." [R. 364.] The charge, of course, was different from the allegations in the indictment, which did not charge the Emergency Price Control Act of 1942, *as amended,* nor the regulations under the *amended Act,* which themselves had been revised and were promulgated by the Administrator as revised regulations.

In *Viereck v. United States,* 318 U. S. 236, 87 L. Ed. 734, the Supreme Court of the United States held that the unambiguous words of a statute which imposes criminal penalties are not to be altered by judicial construction, nor to be altered by reference to rules or regulations pursuant to a statute. And, we assert that the words of an indictment cannot be altered to add the word "as amended" to a statutory reference in an indictment when those words are not there.

We submit, therefore, that the jurisdiction of the Court to proceed was wholly lacking.

III.

The Indictment and Proceedings Violated the Due Process Clause of the Fifth Amendment to the United States Constitution and the Sixth Amendment in Failing to Inform the Accused of the Exact Nature and Cause of the Accusation.

Where the crime is statutory and depends upon regulations to implement the statute and the indictment alleges a statute which by its terms has terminated, or expired, and a Regulation which was then non-existent, we submit that there was no *certainty to a common intent in the indictment,* required to afford the appellants due process of law guaranteed by the Fifth Amendment to the Constitution of the United States, and by the Sixth Amendment to the Constitution of the United States to be informed of the nature and cause of the accusations.

> (*M. Kraus & Bros. v. United States,* 327 U. S. 614, decided 1946.)

As stated in that case:

> "But patent omission and uncertainties cannot be disregarded when dealing with a criminal prosecution."

(See *Potter v. United States,* 155 U. S. 438, 39 L. Ed. 214; *United States v. Maria,* 15 L. Ed. 531.)

We must look to the indictment itself to determine if it properly charges an offense against the laws of the United States—that is attempting to sustain it. If the indictment does not sufficiently charge an offense, and apprise the accused of what he has to meet, then no crime has

been spelled out, either in the indictment or in the trial itself.

Williams v. United States, 168 U. S. 382;

M. Kraus & Bros. v. United States, 327 U. S. 614, 90 L. Ed. 894;

Capone v. United States, 51 F. 2d 609, 616.

We concede that if the indictment had set out specific facts setting out an offense instead of mere conclusions, and in such facts the allegations regarding the statute were erroneous, that an offense might still be spelled out.

But here the facts alleged in the indictment incorporated the statute as one of the facts, and that fact had to be implemented by a regulation under it. Neither the statute as amended, nor the new regulation as revised under which the charge was attempted to be tried, were alleged in the indictment. The statute itself had terminated and the Regulations had been revoked. An amended statute and revised regulations were thereafter set out. The defendants were not charged with violating the amended statute nor the revised regulations. Nor did the pleader set up any facts from which it could be concluded that a different statute or regulation was charged.

As stated in *United States v. Hutchinson,* 312 U. S. 219 at 229:

> "In order to determine whether an indictment charges an offense against the United States, designation by the pleader of the statute under which he purported to lay the charge is immaterial. He may have conceived the charge under one statute which would not sustain the indictment, but it may nevertheless come within the terms of another statute. (See

> Williams v. United States, 168 U. S. 382, 42 L. Ed. 509.) On the other hand, an indictment must validly satisfy *the statute* under which the pleader proceeded. Other statutes not referred to by him may draw the sting of criminality from the allegations. Here we must consider not merely the Sherman law but the related enactments which entered into the decision of the District Court."

In the *Hutchinson* case the long indictment set out *facts*. These facts were full and clear, and the indictment did not rely on merely a statutory reference or designation. The Supreme Court said: "Summarizing the long indictment these are the facts. . . ." (312 U. S. 227.) In our case the indictment makes the statute and the regulations thereunder the statement of facts. These could not under the facts thus alleged constitute an offense. Where facts are full and complete and thus set out a violation of the law the designation of the pleader of the statute would be immaterial but where the only facts alleged are essential the statute and regulation thereunder, the indictment must be judged from those facts.

In *United States v. Hutchinson* the Court said:

> "Were then the acts charged against the defendants prohibited or permitted by these three interlacing statutes? *If the facts laid* in the indictment come within the conduct enumerated in Section 20 of the Clayton Act they do not constitute a crime within the general terms of the Sherman law," etc. (312 U. S. 232.)

The indictment must be judged exclusively from the *facts alleged* and not from conclusions, characterizations and epithets of the pleader.

United States v. Cruikshank, 92 U. S. 542, 23 L. Ed. 588;

Batchelor v. United States, 156 U. S. 426, 39 L. Ed. 478.

The Court in the *Hutcheson* case said:

"Clearly, then, the *facts* here charged constitute lawful conduct," etc. (312 U. S. 233.)

The facts charged in our case constituted lawful conduct under the Emergency Price Control Act of 1942 and Maximum Price Regulation 169 *thereunder.*

Likewise the amendment to the statute and repeal of regulations and the issuance of revised Regulations and their final termination drew the sting of criminality from any alleged violation of the Maximum Price Regulations issued under the former statute. (See *United States v. Cohen,* 270 U. S. 339, 70 L. Ed. 616.)

The Trial Was a Sheer Denial of Due Process of Law. The Indictment Fails to State a Public Offense.

In *DeJonge v. Oregon,* 299 U. S. 353, at 362, 81 L. Ed. 278, the Court held that a conviction upon a criminal charge not made is a denial of due process of law. At page 362 the Supreme Court says:

"Conviction upon a charge not made would be a sheer denial of due process."

The Court points out that the charge cannot be extended beyond the limitations in the indictment.

In *Viereck v. United States,* 318 U. S. 236, 87 L. Ed. 734, the Supreme Court held that the unambiguous words of a statute which impose criminal penalties are not to be altered by judicial construction, nor to be altered by reference to rules or regulations issued pursuant to a statute; nor can the word of an indictment be altered to add the words "as amended" to a statutory reference in an indictment when those words are not there. (*Ex parte Bain,* 121 U. S. 1.)

The defendants were tried on a charge not made and the indictment was void and in violation of due process. (*DeJonge v. Oregon,* 299 U. S. 353.)

Sixth Amendment, United States Constitution;
Carney v. United States, 163 F. 2d 784;
Samuels v. United States, 169 F. 2d 789;
Ex parte Bain, 121 U. S. 1;
Sutton v. United States, 157 F. 2d 661;
Cruikshank v. United States, 92 U. S. 542;
Skelley v. United States, 37 F. 2d 503;
Partson v. United States, 20 F. 2d 127;
Grimsley v. United States, 50 F. 2d 509, 511-12;
Shulten v. United States, 257 Fed. 724;
Moore v. United States, 160 U. S. 268.

The provisions of the Sixth Amendment to the Constitution of the United States require that in every criminal prosecution the accused shall be informed of the nature and cause of the accusation against him. This does not permit some other accusation "as amended." Where the

offense is statutory, which requires inplementing by a regulation, it must be so definite and certain as to inform the defendant of the exact statute and the exact regulation. Where the indictment fails to set forth every ingredient of the offense as to which the defendant is to be tried, it fails to comply with the Sixth Amendment. (*Sutton v. United States,* 157 F. 2d 661, 663.)

One cannot be charged with one crime and tried on another where the crime charged has only a statutory reference as its notice, and where it needs implementing by a regulation under that then existing statute and where the indictment fails to set out facts from which one may be able to know that he is charged with a specific crime under a specific existing statute and regulation. This is not a case where the indictment alleges essential facts necessary to describe the accusation with accuracy and particularity, so that anyone examining it would know exactly the crime charged. Under such a situation, one might be charged with a crime which inaccurately refers to a statute and a regulation. This indictment alleged as a fact that the violation consisted of violating a nonexistent Act and a Regulation thereunder, which did not provide for any such facts as the Government later sought to prove. Such an indictment, we respectfully submit, fails to state an offense against the laws of the United States. To withhold essential facts in the indictment that are required to describe the accusation with accuracy and certainty is to deny full information of the nature and cause of the accusation as required by the Sixth Amendment to the Constitution of the United States.

Sutton v. United States, 157 F. 2d 661;

United States v. Cruickshank, 92 U. S. 542, 557.

As said in *United States v. Ferranti,* 59 Fed. Supp. 1003, the indictment must set out the nature and cause of the accusation and no element of the crime charged must be left to conjecture or surmise. In that case the Court sustained motions to quash counts 1 to 18 of the indictment, where Maximum Price Regulation 169 had been revised twice after the return of the indictment. The Court sets out in full the requirements that an indictment set out the exact charge which the accused must face and under the exact regulation, which becomes important to the defendant in determining under which amendment he is to be tried in respect to each of said counts in the indictment.

> "Without that knowledge it would be difficult for him to prepare his defense. It may be too late for him to produce witnesses to answer the Government's charges if he learns the essential details thereof only after he has been put on trial."

The Court quotes from *United States v. Potter,* 56 Fed. 83:

> "In order to properly inform the accused of the 'nature and cause of the accusation,' within the meaning of the constitution and of the rules of the common law, a little thought will make it plain, not only to the legal, but to all other educated, minds, that not only must all the elements of the offense be stated in the indictment, but that also they must be stated with clearness and certainty, and with a sufficient degree of particularity to identify the transaction to which the indictment relates as to place, persons, things, and other details." (And we may add here, as to the exact statute and the exact regulation.)

A defendant should not be required to guess at what he is charged with, namely, that although the prosecutor

charged him with a violation of a statute which has expired, he has to assume that he is charged with an amended statute not alleged, and then permit the prosecutor to rely on a Court of Appeals to relieve him of his carelessness and lack of specificity in such a solemn declaration as an indictment. Where the error is exposed on appeal, the prosecuting attorney seeks to have the Appellate Court justify the unconstitutional proceeding, but the liberty of a citizen cannot be risked on so slim a basis. See cases cited in *United States c. Ferranti,* 59 Fed. Supp. at page 1004; also *United States v. Potter,* 56 Fed. 83, 89.

In *United States v. Interstate Properties,* 153 F. 2d 469, at 471, the District Court of Columbia also sustained demurrers to an indictment for vagueness and uncertainty of the indictment, concerning statutory or regulatory requirements, and in *United States v. Crummer,* 151 F. 2d 958, 962, the Court also reviewed the need for an indictment to allege the nature and cause of the accusation with clarity and certainty and must descend to particulars and charge every constituent ingredient of the crime, which means the specific statute relied on where the charge is based upon a stautory offense.

In *United States v. Durst,* 59 Fed. Supp. 891, the Court sustained demurrers to an information charging a violation of War Food Distribution orders, where the statutes or regulations supposedly relied on were indefinite and uncertain.

If so, this Court could have taken judicial notice in *Carney v. U. S.,* 163 F. 2d 784, that there were no K-14 ration coupons. Congress itself in amending the Act in the amending statute cited that what it was amending was the Emergency Price Control Act as *amended.* We set

out here the Act of Congress in full, setting out the language of Congress with reference to the amendments. Sections 17, 18 of Act of July 25, 1946, c. 671, 60 Stat. 678, provides:[a]

---

[a]"Sec. 17. This Act may be cited as the 'Price Control Extension Act of 1946.'

"Sec. 18. (1) The provisions of this Act shall take effect as of June 30, 1946 and (2) all regulations, orders, price schedules, and requirement under the Emergency Price Control Act of 1942, *as amended* (except regulations or requirements under sec. 2(e) thereof relating to *meat,* flour or coffee) and the Stabilization Act of 1942, *as amended,* which were in effect on June 30, 1946, shall be in effect in the same manner and to the same extent as if this Act had been enacted on June 30, 1946 and (3) any proceeding, petition, application, or protest which was pending under the Emergency Price Control Act of 1942, *as amended,* on June 30, 1946, shall be proceeded with and shall be effective in the same manner and to the same extent as if this Act had been enacted on June 30, 1946: Provided, That in any case in which the Emergency Price Control Act of 1942, *as amended* (except sections 204 and 205), or the Stabilization Act of 1942, *as amended* (except sections 80 and 9), or any regulation, order, or requirements under either of such Acts, prescribes any period of time within which any act is required or permitted to be done, and such period had commenced, but had not expired on June 30, 1946, such period is hereby extended for a number of days equal to the number of days from July 1, 1946, to the date of enactment of this Act, both inclusive: Provided further, That any act or transaction, or omission or failure to act, occurring subsequent to June 30, 1946, and prior to the date of enactment of this Act, shall be deemed to be a violation of the Emergency Act of 1942, *as amended,* or the Stabilization Act of 1942, *as amended,* or of any regulation, order, price schedule, or requirement under either of such acts: Provided further, That in so far as the provisions of this Act require the Administrator to make any change in any maximum price, such provisions shall not be deemed to require such change to be made before the thirtieth day following the date of enactment of this Act."

If the words "as amended" were not necessary Congress did an idle act.

It will be noted first of all that Congress referred in the Price Control Extension Act of 1946 to the Emergency Price Control Act of 1942, *as amended.* This was an entirely new Act in 1944. It did not refer to the Emergency Price Control Act. It is, therefore, apparent that the title to the law as it previously existed was the Emergency Price Control Act *as amended,* not merely the Act.

It is also to be noted from the above that the Price Control Extension Act of 1942 excepted from the extension any requirements relating to *meat* and that, therefore, all laws and regulations relating to meat and meat prices in fact had expired on June 30, 1946, prior to the time of the trial of this case, and were not extended by the new law. No law or regulation was applicable after June 30, 1946.

In 1944 Congress completely adopted a new Emergency Price Control Act, *as amended.* Counsel, therefore, is mistaken as to his reference to the title of the Act thereafter as referred to by Congress itself, which construed the words *"as amended"* as essential to its reference to the Act, which it was thereafter extending by the subsequent price control Acts.

As a matter of fact, the Emergency Price Control Act of 1942 ceased to be called by that title in 1944. In 1944 a new Act was passed, called the Stabilization Act of

1944 (Ch. 325, Title I, Sec. 101, 58 Stats. 632), amended June 30, 1945 (Ch. 214, Sec. I, 59 Stats. 306).

Issues of slaughtering came under the Stabilization Act, first passed in 1942 (Ch. 578, 56 Stat. 765).

That Act appointed an Office of Economic Stabilizer and completely rewrote price control, making stabilization of prices, wages and salaries all a part of the Act, requiring that particularly relating to slaughter of animals and the requirements thereunder. (Act of Oct. 2, 1942, Ch. 578, 56 Stats. 765.) The provisions of that Act were to terminate June 30, 1944, or at such earlier date as the Congress by concurrent resolution may prescribe (56 Stats. 767) as amended June 30, 1944 (Ch. 203, 58 Stats. 648).

As a matter of fact, the alleged violations of the appellants related to the fixing of prices resulting from the processing of agricultural commodities, including livestock, as defined in the Stabilization Act, where Congress said *a generally fair and equitable margin* shall be allowed for such processing. (56 Stats. 765.) The Act expired June 30, 1946, and during the pendency of this trial. The new Act did not relate to meats or affect appellants.

Congress Thought the Words "As Amended" Were Essential to Each Change in the Statute, so Did the Administrator in Referring to His Authority Under the Regulations. He Also Thought It Essential to Refer to the Regulations as "Revised" Regulations Under the Amended Statute. Can the Pleader in an Indictment Do Less?

The question for this Court to decide then is WHETHER AN INDICTMENT WITHOUT SETTING OUT ESSENTIAL FACTS MAY CHARGE VIOLATION OF A STATUTE MERELY BY A STATUTORY REFERENCE WHICH REQUIRES IMPLEMENTATION BY A REGULATION THEN EXISTING AND THEREAFTER THE DEFENDANT BE CONVICTED AND SENTENCED, NOT ON THE STATUTE AS REFERRED TO IN THE INDICTMENT OR UNDER THE REGULATION AS THEN EXISTING, BUT UNDER AN AMENDMENT TO THE STATUTE AND UNDER A REGULATION WHICH WAS REVISED MANY TIMES PURSUANT TO THE AMENDED STATUTE, ALL OF WHICH HAD TERMINATED. We contend that he may not; that jurisdiction was never acquired of the subject matter in this case by means of this indictment.

Jurisdiction can never be gained by consent of the parties. The proceedings were as much a nullity as the hearing in the Army appeal in *Defense Supplies Corporation v. Lawrence Warehouse Corporation* in the Court of Appeals, 93 L. Ed.

A trial on a charge not duly made by the indictment is a sheer violation of due process of law.

DeJonge v. Oregon, 299 U. S. 353, 81 L. Ed. 278.

The Denial, Under the Circumstances of This Case, of a Bill of Particulars, Was Error.

At the very outset of the case the defendants made a demand for a Bill of Particulars. [R. 28.]

With reference to the conspiracy count, he requested what regulation and what portion of that regulation the defendants were charged with violating, and the charge it is alleged the defendants made for slaughtering services and what prices in excess of the maximum prices it was allegedly charged, and the date of the charge.

As to each of the items allegedly sold, a request was made for the maximum price permitted to be charged at the time and under the particular regulation for the character of beef allegedly sold, and as to which defendant allegedly committed the act.

Likewise, a request was made for the same item as to the entry made in the books, or caused to be made. [R. 30-31.] The Bill of Particulars was denied. [R. 32.]

The Court Erred in Refusing the Defendants a Bill of Particulars, as Demanded.

This demand was in addition to the Motion to Dismiss for want of uncertainty. The indictment itself was in the language of conclusions of the pleader. It merely alleged prices in excess of the Maximum Price. It failed to set out the particulars.

The Motion to Dismiss should have been granted, but in the absence of granting that Motion the Motion to grant a Bill of Particulars should then have been granted.

U. S. v. Cruikshank, 92 U. S. 542, 23 L. Ed. 588;

U. S. v. Hess, 124 U. S. 483, 31 L. Ed. 516;

Foster v. U. S., 253 Fed. 481;

Miller v. U. S., 288 Fed. 817;

Sixth Amendment, Constitution of the United States.

A defendant is entitled to particulars as to times, places, persons present and other data necessary to make his defense.

New Rules of Criminal Procedure, Rule 7, subd. (f);

Glasser v. United States, 315 U. S. 60, 86 L. Ed. 680.

As a matter of fact, had a Bill of Particulars been furnished, it would have been considered as supplemental to and part of the indictment and might have cured the patent omission which the indictment showed on its face to have regarding prices and regulations allegedly violated. It might have been sufficient to have put the defendants on notice of exactly what they were charged with and what it was expected he had to meet.

The indictment as alleged and without the Bill of Particulars failed to contain charges with sufficient certainty to apprise the accused of what he had to meet so that he might plead the charges.

The prosecution was commenced under a non-existent regulation and a non-existent statute.

The Court was therefore without power to pronounce judgment and the judgments were a nullity.

IV.

The Verdicts Are Contrary to the Law and the Evidence. The Evidence Is Insufficient to Support the Verdict.

(1) The evidence is insufficient to support the verdict on the indictment as laid. The indictment charges the offenses under the Emergency Price Control Act of 1942 and Maximum Price Regulations thereunder. The Regulations thereunder had no fixed prices that were universal, therefore the proof entirely fails insofar as any of the counts are concerned.

We readopt here all of the arguments heretofore urged on this point under the heading that the Statute and Regulations were both terminated at the time of this trial.

(2) Assuming that the defendants could be tried under a Statute and a Regulation not charged in the indictment, by a Statute that was amended and Regulations that were many times superseded, and assuming that the appellants could be tried thereunder, the evidence was still insufficient in the following respects.

I.

Count One charged a conspiracy. Assuming that the charge was under the act as amended and revised regulations, there is absolutely no proof of any conspiracy on the part of the appellants. There is no proof of any unlawful agreement between them to violate the Emergency Price Control Act or Regulations in any of the respects alleged in Count One of the indictment, and in pursuance thereof.

As to the overt acts alleged in the indictment, not a single overt act was proved either as having been done

or as having been done in furtherance of and to effectuate the purposes and objects of the alleged conspiracy. Overt acts (a) to (h) concerned slaughtering services and invoices for them. There was no proof of any of the slaughtering services by the appellants nor any proof of their having issued any of the invoices mentioned therein, nor was there any proof that any of these services were done in furtherance of and to effectuate the purposes of the conspiracy. As to overt act (i), there is no proof that the defendants began operating under the firm name of Southern California Meat Company No. 2, for the purposes of effectuating the object of the conspiracy.

As to overt acts relating to H. N. Sample—H. N. Sample was not a witness and there is no evidence that they accepted any money from him to further the objects of any conspiracy.

There is no evidence that the defendants began operating under the firm name of Central Packing Company in furtherance of or to effectuate the purposes of the conspiracy, nor that they issued any invoices on behalf of the Central Packing Company in furtherance of any alleged conspiracy.

Counts Two, Three, Four, Five, Six, 45, 46, 47, 48, 49 and 50 of the indictment alleged a charge in excess of the Emergency Price Control Act of 1942 and the Maximum Price Regulation 169. Both appellants were convicted on everything, but the testimony as to Counts Two and Three related solely to Hyman Stillman. The witness said he dealt only with Stillman. There is no evidence that he made any purchase from Lou Segal nor that Segal had any knowledge of the same. As to all of the other counts, the witnesses said they dealt only with Segal and they had no dealings whatsoever with Stillman.

There is absolutely no evidence that Stillman knew anything about the transactions.

The evidence against the men, given by men who, if believed, were themselves violaters of the same law—one of them at least stating that he passed on the alleged overcharges to his customers, was not substantial evidence. They were exchanging immunity for what they said. [R. 103.]

There was no corroboration of any of their testimony.

See:

Sykes v. U. S., 204 Fed. 909;
Dahley v. U. S., 50 F. 2d 37.

All of the witnesses were highly uncertain. None testified as to any specific transaction. The prosecutor lead them in his questions. Muehlberger didn't know how much meat he got. He did not weigh it. [R. 101.] He did not know how much meat was delivered. [R. 102.]

Muehlberger, said he gave Stillman $120.00 a couple of days after the meats were delivered. He did not know exactly what he paid in respect to the various items. [R. 102.]

Since the conspiracy and the substantive counts were all charged in one indictment, it is necessary to segregate them and all of the evidence to see if there is any proof of any conspiracy. Nor could the evidence offered in support of the conspiracy prove the substantive counts.

The testimony of William Muehlberger is only testimony relating to purchase of meat from Mr. Stillman in the fall of 1944, from Southern California Meat Co., #2 [R. 88] on October 25, 1944. There is no evidence of any conspiracy in his testimony.

The testimony of Horace Greeley Weaver relates to the sale of meat in the month of February, 1945, from Mr. Lou Segal. [R. 108.] There is no evidence of any conspiracy in his testimony.

The testimony (over objections) of Samuel Namson, a Public Accountant acting for a Mr. Aaron Rosensweig [R. 139], related to a conversation with Mr. Stillman and Mr. Segal subsequent to any of the transaction, on about April 1945, regarding an entry in their journal, entering certain items on the books as credit entries rather than as sales. Whether their books were kept as individuals rather than a partnership. [R. 146.] Aaron Rosensweig was treated as an individual. Mr. Segal and Stillman were drawing a salary of $200.00 a week. Mr. Namson thought the account should be kept in another way. Mr. Namson related a conversation he had with Mr. Stillman regarding this money, which had been accumulated from the sale of meats to different customers, which Mr. Stillman called bonuses over and above ceiling prices. However, it in no way proved or established any conspiracy, and was not a conversation in furtherance of any conspiracy.

Mr. Rosensweig testified to investing $25,000.00, starting out on or about January 1, 1945 in a joint venture with Stillman and Segal for the purchase of cattle for a 90-day period. He got a check back for $24,000.00. Other than furnishing the money for the cattle business, his testimony did not show any violation of any law.

Allan Locke testified he ran a market known as Dana & Roberts. Allan Locke merely testified to the payment of certain amounts shown on certain invoices, and the amounts shown are the amounts which were actually paid.

Leo Blank testified he worked in the Meat Department of Dana & Roberts and paid certain amounts of money to Louis Segal, towit one penny a pound. [R. 182.] He said he paid one to four cents per pound for veal [R. 185], from Lou Segal. [R. 185.]

Clarence S. Wright said he paid two cents to a Mr. Irving. [R. 22, 222.]

Donald Oliver Bircher was an Internal Revenue Agent who secured a voluntary disclosure when Mr. Segal paid his income tax on the same. This testimony is not proof of any conspiracy, nor any declarations in furtherance of any conspiracy.

Krulewitch v. U. S., 17 Law Weekly 4273;
Fiswick v. U. S., 329 U. S. 211, 216;
Brown v. U. S., 150 U. S. 93, 98;
Graham v. U. S., 115 F. 2d 740, 743.

Edward F. Cunningham was an OPA pricing expert, who merely identified prices.

Samuel J. Phoebus, also a Special Agent of the Bureau of Internal Revenue, testified as to a discussion had with Hyman Stillman, regarding books and to alleged admissions by Hyman Stillman to him in the course of that investigation.

None of this testimony, individually or collectively, was any proof of any conspiracy between the two defendants and the two other defendants who were not on trial; nor is there any proof of Paragraph 3 of Count I of the Indictment that any of the acts (a) to (f) were done in furtherance of any conspiracy and to effect the objects of the conspiracy. There is no proof that either of the

defendants prepared Southern California Meat Company invoice No. 14942, showing a charge of $100.00 for slaughtering.

There is no proof that on July 7, 1944, the defendants prepared invoice No. 14985, showing a charge of $422.00 for slaughtering, nor that any such acts were done in furtherance of and to effectuate a conspiracy.

An examination of each of the other alleged overt acts fails to show that either of the defendants did any of the things specifically charged in any of the overt acts, or that any of those acts were done in furtherance of and to effectuate the purposes and objects of a conspiracy.

Before one may be convicted of a conspiracy, there must be not only proof of the conspiracy, but there must be proof that at least one overt act was done in furtherance of and to effectuate the objects and purposes of the conspiracy. And, furthermore, there must be unanimity on the jury as to the overt act which it is alleged the defendants committed in furtherance of and to effectuate the objects of the conspiracy.

We have been unable to find any evidence in support of a single overt act that was charged and in support of any proof that the act was done in furtherance of and to effectuate the object of the conspiracy. Therefore Count One of the indictment must fall for lack of proof.

Count Two of the indictment charged the sale of meat by Charles M. King, Hyman Stillman and Lou A. Segal. There is no evidence whatever that Lou Segal had anything to do with this transaction, nor that he sold it at any over ceiling price. Evidence offered in furtherance

of the conspiracy count was not admissible to prove these counts.

The witness thought he gave Mr. Stillman a check for $120.00 [R. 92] and he paid the invoice price of $312.23 by check and five cents over. [R. 95.] He paid this a few days after he received the meat. [R. 105.] He did not weigh the meat. He could not testify as to the exact quantity he received. [R. 101, 102.] The meat was delivered when he wasn't there. [R. 101.]

Thus, Counts Two and Three relate only to Mr. Stillman.

Counts Four, Five and Six relate to meat sold to the Clover Meat Company, which was represented by Horace Greeley Weaver, and his testimony related only to transactions with Mr. Lou Segal. [R. 108.]

While there was an assurance to connect it up with Mr. Stillman, it never was connected up with Mr. Stillman. [R. 109.] None of the other counts were connected up with Stillman.

As to Count 12, there is no evidence that the defendants, or either of them, made or caused to be made a false entry on invoice 1666. There is no proof that the defendants made the entry. There is no proof that the invoice was an invoice kept in the regular course of business where it was customary to keep such an invoice. Therefore, nothing was proved as to Count 12.

As to Count 13, there is no proof that Mr. Stillman and Mr. Segal made, or caused to be made, any entry on invoice 718, or that they caused a false entry to be made upon it, or that such a record was required to be kept

under the Maximum Price Regulation 169 originally adopted.

There is no proof that invoices, documents or records were to be kept under the provisions of the Emergency Price Control Act of 1942, even as amended, nor under the Maximum Price Regulation 169 thereunder, or as superseded.

The Revised Regulation, regarding the keeping of records and reports, only required the person making a sale to make and preserve for inspection by the OPA for so long as the Emergency Price Control Act of 1942, as amended, remains in effect a complete and accurate record. No particular record or type of record is set forth. (S. 1364.407 Revised Maximum Price Regulation.) There is no provision in the regulation for giving an invoice to the purchaser or that that invoice was any record made and preserved for inspection by the OPA.

The prosecution utterly failed to produce any evidence of any records of the defendants which were made and preserved by inspection by the Office of Price Administration. They failed to prove that the invoices of purchasers were such records.

As to Count 32, the records of the Central Packing Company were not introduced in evidence. There was no evidence showing a false entry upon the said books; there was no showing that the entry of the receipts of the Central Packing Company were false, and only a dispute as to how the entry should be entered. It is not shown that the particular ledgers were such books as were required to be kept pursuant to the Emergency Price Control Act of 1942 (even as amended), or the Maximum

Price Regulations 148, 169, 239, even as revised. There is no showing that there were not some other books and ledgers which were kept pursuant to the statute. There is no proof that the method of bookkeeping was false. There is a difference between falsity and a mistake. The evidence shows that the books in question, even if material, were kept according to the way that it was thought proper to keep them, and that they were corrected in accordance with the third partner's accountant's desire to correct them.

It was not shown that these books were ever seen by anybody else prior to the correction, or that they ever were inspected by any OPA official prior to their correction.

As to Count 37, there is no evidence that either defendant made or caused to be made a false entry upon invoice 5110, or that said invoice was one of the records being kept pursuant to the Emergency Price Control Act of 1942 (even as amended) or as to Maximum Price Regulation No. 169 thereunder (even as revised).

All that the Regulation required was to keep records; it didn't require any particular records, and there is no showing that the invoice was one of the records being kept pursuant to that Regulation.

The same argument is applicable to Counts 38, 39, 40, 41, 42, 43, and 44.

As to Count 45, there is no showing that Mr. Stillman had anything to do with the transaction. The same is true with Counts 46, 47, 48, 49 and 50. All of the Dana & Roberts transactions were carried on with Mr. Lou Segal. There is not one scintilla of evidence to connect Mr. Stillman with them.

As to Count 47, the record shows that the witness was not sure to whom he had made any overpayment. [R. 193.] Yet both men were convicted on this count.

As to Count 50, the record does not show any evidence as to whom the overcharge was made. [R. 193.] Again both men were convicted.

There is no evidence whatsoever that either of the defendants knew what the other was doing. Quite the contrary, the Government's evidence shows the opposite in the statement of Segal taken by the Revenue agents. [R. 263, 268, 269.]

Although the only testimony given in relation to Counts Two and Three referred to Mr. Stillman [R. 93, 98], the defendant Segal was also convicted on this count. And, on the other counts on which the reference was only to Segal, nevertheless the jury arbitrarily convicted as to Mr. Stillman.

The evidence did not support any of these convictions.

Counts 12, 13, 32, 37, 38, 39, 40, 41, 42, 43 and 44 are counts alleging that a false entry was made in a book or record required to be kept for the purposes of the OPA statute. There is no evidence whatsoever that any of the records which were introduced in evidence were records that were being kept to fulfill the requirements of the statute. On the contrary, the records were of a kind that might not be kept for that purpose. Nor was there any evidence as to just what records the appellants did keep if they were not keeping a separate and distinct set of records for the purpose of fulfilling the requirements of the OPA statute.

The offense could only be committed if false entries were kept on records that were being kept for the purposes of maintaining accurate records for inspection by the Office of Price Administration. It was incumbent upon the Government to prove that the documents which they offered were the documents kept by the appellants pursuant to the requirements of the statute to make and preserve for inspection by the Office of Price Administration as a complete and accurate record of each sale of meat subject to the Revised Regulations and the price charged or received or paid therefor. If the seller did that, it became immaterial what other invoices or books or documents were being used.

Counts 12, 13, 37, 40, 41, 42, 43 and 44 charge a false entry on an invoice. There is no evidence as to who prepared the invoice or how it was prepared. None that either of the appellants had anything to do with the preparation of the invoice; nor is it shown that the invoices were the documents being kept by the appellants pursuant to the Emergency Price Control Act of 1942 or any regulations thereunder.

Count 32 related to a ledger. An examination of the ledger showed that there were only ledger entries therein such as are commonly kept in a ledger account in a large sum entry, without explanation as to reference to a journal or other books of original entry. It is evident that a ledger is not such a book as is kept or required to be kept pursuant to the Revised Regulation under the amended statute, No. 1364.407.

Counts 38 and 39 apply on a statement given to the seller. Such a statement was one given to a buyer as a

statement of the sum due and certainly is not a record kept or required to be kept by the statute and regulations.

Prices on Invoices Were Prices Charged.

The invoices introduced into the evidence were actually the price charged, according to the government's theory. The testimony of witnesses as to any other amounts given were a gratuity—or a tip—not for the meat but to the individual himself for services otherwise.

When a waiter brings a restaurant bill, that is the price charged. The tip which one leaves is a gratuity and is not a charge.

The statement of Mr. Segal which the Government introduced as its affirmative evidence, and by which it is therefore bound, if admissible at all, set out that moneys he, Segal, received, were gifts or tips—not charges in excess of maximum prices, and that Stillman knew nothing of them. [R. 265, 266-269.]

We submit, therefore, that there is no proof of any conspiracy to violate the Emergency Price Control Act of 1942, or any Regulations thereunder. There is no proof of any conspiracy to violate the Act, as amended, or any Revised Regulations thereunder. There is no proof of any overt act alleged in the indictment in furtherance of any conspiracy.

As to the overt acts of the substantive counts, except as to Counts Two and Three, there is no proof as to any act involving Hyman Stillman. As to the alleged false entry counts, there is no proof that the invoices were invoices or books required to be kept, or were being kept, for the purposes of the Office of Price Administration.

Therefore, it is respectfully submitted, that the verdicts are contrary to the law and the evidence.

V.

The Regulations as to the Type of Records to Be Kept Were So Uncertain and Indefinite as Not to Form the Basis of Any Criminal Prosecution Under These Counts.

In *M. Kraus & Bros. v. United States,* 327 U. S. 614, 90 L. Ed. 894, it was stated that Regulations, like statutes, must be definite and certain to fall under the ban of unconstitutionality.

Section 1364.407, specifying that every person making a sale of any beef carcass, beef wholesale cuts, veal carcass or veal wholesale cuts, or other meat item subject to this Revised Regulation, "shall make and preserve for inspection by the Office of Price Administration so long as the Emergency Price Control Act of 1942, as amended, remains in effect, complete and accurate records of each such sale."* It fails to specify what kind of records or

---

*"S. 1364.407 Records and Report. * * *

"(a) Every person making a sale and every person in the course of trade or business making a purchase of any beef carcass, beef wholesale cut, veal carcass or veal wholesale cut or other meat item subject to this revised regulation, shall make and preserve for inspection by the Office of Price Administration for so long as the Emergency Price Control Act of 1942, as amended, remains in effect, complete and accurate records of each such sale or purchase, showing the date thereof, the name and address of the buyer and seller, the quantity, type of cut or item, grade or grades and weight of all beef carcasses, beef wholesale cuts, veal carcasses and veal wholesale cuts or other meat items subject to this revised regulation sold or purchased and the price charged or received or paid therefor."

where they should be kept, or any details, as to the kind or character of records which shall be kept for the OPA.

As stated in *M. Kraus & Bros. v. United States,* 327 U. S. 614, 90 L. Ed. 894, at page 899:

> "But patent omissions and uncertainties cannot be disregarded when dealing with a criminal prosecution. A prosecutor in framing an indictment, a court in interpreting the Administrator's regulations or a jury in judging guilt cannot supply that which the Administrator failed to do by express word or fair implication. Not even the Administrator's interpretations of his own regulations can cure an omission or add certainty and definiteness to otherwise vague language. The prohibited conduct must, for criminal purposes, be set forth with clarity in the regulations and orders which he is authorized by Congress to promulgate under the Act. Congress has warned the public to look to that source alone to discover what conduct is evasive and hence likely to create criminal liability. United States v. Resnick, 299 U. S. 207, 81 L. ed. 127, 57 S. Ct. 126."

VI.

The Court Erred in the Admission Into Evidence of the Income Tax Return by Each of the Appellants.

A.

There Was No Proper Foundation Laid for Their Admission, nor Was Any Connection Shown.

The court erred in failing to strike these returns from the evidence.

Over objections of the appellants, the court permitted the income tax returns of the defendants to be admitted in evidence. Other than the fact that the returns had the blue seal, of the Treasury Department on them, there was nothing to connect these returns with the evidence in the case. A return purporting to be signed by a Lou A. Segal was in fact prepared, according to the statement on the return, by a Jack Effron and it was a typewritten document, which proved nothing and was hearsay as to the appellant. It was not a record the admissibility of which is admitted proved the facts therein set out. It was sheer hearsay. The mere fact that it had a seal of the Treasury Department on the typewritten document proved nothing.

Likewise, the documents signed by Hyman Stillman "was a typewritten document." Who it was prepared by or how, and the authenticity of the signatures, or the knowledge of the defendants regarding it, were nowhere shown in the case.

Judge Denman, in *Greenbaum v. United States*, 80 F. 2d 113, at 126, held such cards produced in the case from tax evidence was reversible error.

The admission of the returns in evidence were prejudicially erroneous for another reason also. There was nothing specific in any of these returns to identify any of the alleged transactions on trial, yet a vague and general admission could be easily misconstrued by the jury.

The transactions were not admissible in proof of any alleged conspiracy. (*Krulewitch v. U. S.*, 93 L. Ed. 17, L. W. 4273.) They therefore were not admissible on that theory. They were too remote on the particular transaction to be admissible.

B.

Title 26, Section 55, U. S. Codes, Inherently and as Construed and Applied in This Case and the Regulations Issued Pursuant Thereto Are Unconstitutional in That They Violate the Defendants' Rights Under the Fourth and Fifth Amendments to the Constitution of the United States.

(a) Members of the Bureau of Internal Revenue were not authorized to disclose the information which they had obtained in the course of their official duties.

(b) Statements as well as income tax returns taken by members of the Bureau of Internal Revenue pursuant to the authority vested in them by statute to compel such statements must either be limited to the use for which they are given or their compulsion violates the Fifth Amendment to the Constitution of the United States.

(c) Since under Section 54, Title 26, the taxpayer is compelled by statute to make such return and statements, the statement has the effect of being compulsory and there-

fore cannot be used against an accused in any criminal trial, unless the statute grants amounts in exchange for compulsion which it requires. Any other provision or construction would be in violation of the Fifth Amendment to the Constitution of the United States.

See:

Feldman v. United States, 322 U. S. 487;

Counselman v. Hitchcock, 142 U. S. 547, 35 L. Ed. 1110;

Brown v. Walker, 161 U. S. 591, 40 L. Ed. 819;

Monia v. United States, 317 U. S. 424.

The regulations provide that the United States Attorney is limited to the use in any event for which the inspection was permitted: "When a return or copy is thus furnished, it shall be limited in use to the purpose for which it is furnished."

This means that the request must be specific and must specifically designate what use is to be made of it and not permit it to be omnibus catch-all general use.

There was a failure to comply with such specific requirements, even if the sections and regulations be construed as constitutional.

Title 26, Section 55, U. S. Codes and Treasury Regulations TD 4945, Sections 463D4, 463D5; TD 4929, Sections 463C34, 463C36, 463C37, 463C35, 45831, 45833, 45834, 45838, 45839, 45890 and 45864, inherently and as construed and applied in this case are unconstitutional

and in violation of the Fifth Amendment to the Constitution of the United States, in that although the statements are compelled through the authority of law the statute does not grant immunity for use of these compelled statements as broad as the provisions of the Fifth Amendment to the Constitution of the United States.

Errors of the Court on Admitting Income Tax Statements.

There is no doubt that the statute and applicable regulations compel disclosure. It does not grant immunity as broad as the disclosure which is compelled.

Counselman v. Hitchcock, 142 U. S. 547-586;
Monia v. United States, 317 U. S. 424.

The Court also erred in admitting these returns on the constitutional grounds. The returns are compelled statements required to be kept by law and the statute, inherently and as construed and applied in the case, would be violative of the self-incrimination clause of the Fifth Amendment to the Constitution of the United States, unless the statute compelling them give immunity as broad as the requirement. (*Feldman v. United States,* 322 U. S. 487.)

VII.

The Trial Court Erred in Admitting Statements Made to the Agents for the Bureau of Internal Revenue.

A.

Title 26, Section 55, authorizes the use of "returns" pursuant to the statutes and regulations applicable thereto and with special permission of the President and the Secretary of the Treasury. However, it does not make statements made to the Bureau in the course of securing any information public. On the contrary, it makes that information confidential and provides a penalty for any agent to violate the section. (Title 26, Section 55(i).) Therefore, it is implicit in the language of the section that only returns are permissible to be used and to be used public, but statements are not. It was therefore error to permit agent Bircher to testify as to statements made to him in the course of his inquiry, and to permit in evidence the statement of the defendant Segal.

It was therefore prejudicial error for the court to admit Exhibits 10, 11 and 33 in evidence and it infringed the constitutional rights of the appellant.

Furthermore, no statement would in any event be admissible on Count One until there had been proof of a conspiracy and that the statements were made in furtherance of the conspiracy.

As there had been no proof of any conspiracy independent of any statement, and no proof that the statement was in furtherance of the conspiracy, it was prejudicial error to admit this document in evidence. (*Krulewitch v. United States,* 17 Law Weekly 4273.)

B.

The Court also erred in the admission of the testimony of Samuel J. Phoebus, another agent of the Bureau of Internal Revenue. [R. 292.] Mr. Phoebus, another Internal Revenue Agent, was permitted to testify over objections that he questioned the appellants Segal and Stillman regarding Government's Exhibit 39, the Books of the Southern California Company No. 2. [R. 294, 295.] This book contained a heading "Sales—Meat for the year 1944." [R. 296.] Page number CR3, record of checks drawn on bank, month of October, 1944. Without any foundation being laid, the Court permitted pages of the book to be introduced into evidence, 39-A, 39-B, 39-C. [R. 298, 299.] The Court then permitted conversations between Segal and Mr. Phoebus and after some objections, the Court's having ruled that these statements were admissible to both defendants [R. 302, 303], the prosecutor himself asked that they be made applicable only to one defendant and the Court struck them all.

Nevertheless, the Court admitted the documents in evidence over objections. There was no foundation laid under the provision of Title 28, §695, that these were the books and record kept in the regular course of business, and it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence or event, within a reasonable time thereafter.

C.

The Court likewise permitted Mr. Phoebus to testify as to conversation with Mr. Segal about his income tax returns, although Title 26, Section 55 does not permit such statements or interviews to be public. Section (i) forbids

the agents disclosing them to anyone. These were not returns; they were statements and interviews regarding returns.

D.

The trial court later, on a motion of the appellant, in the absence of the jury, objecting to Exhibit 39-A, B, C, agreed that "it may be withdrawn." [R. 321.] Nevertheless, the Court at no time instructed the jury that the evidence thus given and withdrawn was stricken from the record, nor was the book actually withdrawn. It remained in evidence and is before this Court. [Exhibit 39.] This was highly prejudicial error. (*Greenberg v. United States,* 80 F. 2d 113, 126.

VIII.

The Court Erred in the Admission of Exhibits 10 and 11 in Which the Testimony of Samuel Namson Was Given. [R. 140.]

Exhibits 10 and 11 were books which were brought to Mr. Namson, a public accountant representing a Mr. Aaron Rosensweig, who became a third partner with Mr. Stillman and Mr. Segal in Central Packing Company in 1945. Mr. Namson asked Mr. Stillman about an item of $30,100.00 which appeared in the journal as a debit and he thought the item should be entered as sales instead of a debit [R. 149], which he said would show a profit of about $2,900.00 instead of a loss of about $27,000.00 or $28,000.00. This was so that the record could show a correct and true income tax return. [R. 149.] Mr. Stillman then changed the entry and Exhibits 10 and 11 were offered in support of Counts One and 32, and

received in evidence over objections that there was no proper foundation, and that such was irrelevant, incompetent and immaterial. [R. 153.] Motion to strike the books on the ground that they did not conform to the business records statute were denied by the Court. [R. 321.]

There was absolutely no foundation laid for the introduction of these books. There was no showing that these books were kept in the regular course of business or that it was the regular course of business to keep these books, and it was the regular course of such business to make memorandum or record at the time of such act, transaction, occurrence or event, or within a reasonable time thereafter. In fact the entry which was made by Mr. Stillman was not made in the regular course of business and it was not the regular course of such business to make such memorandum in the office of an accountant representing someone regarding income tax and for income tax purposes to correct the account. Hence, these records were not in conformity with the requirements of Title 28, Section 695 and could not be introduced to prove the records therein contained.

Count 32 charged the making of a false entry on the general ledger of the Central Packing Company "and said record was a document required to be kept under the provisions of the Emergency Price Control Act of 1942 and Maximum Price Regulations 148, 169 and 239 thereunder, which had been duly promulgated pursuant to the provisions of said Act."

There was no evidence, however, that a general ledger was being kept pursuant to said Act; that it was a document required or was the kind of a book required to be

kept pursuant to said Act. As a matter of fact, a general ledger was not such a document required to be kept. The act does not say what kind of record was required to be kept. Furthermore, the ledger was itself withdrawn from evidence by the Government, and it must be assumed that all testimony relating to it was withdrawn.

Furthermore, the testimony of Mr. Namson was merely that he disputed with the appellant Stillman as to how the item should be entered with relation to the partnership, or joint venture arrangement between the three joint venturers. There is nothing to show that it was false, nor that the views which appellant Stillman took were not correct. It was not shown who made the false entry or who caused it to be made, or that either of the appellants had done so.

Samuel Namson came to Mr. Rosensweig's office to figure out whether he had made a gain or a loss in his joint venture with the defendants for a three months period in the slaughtering of cattle. Mr. Rosensweig brought the books to him at his office. A discussion was had between him, Mr. Segal and Mr. Rosensweig. There was a debit entry to accounts payable of $30,100. The credit entry was credited to Mr. Stillman of $15,050, and Mr. Segal $15,050. He (without identification) said they were bonuses and he did not consider them as sales. "The item was changed to sales at the request of Mr. Namson, showing a profit of $2900.56 instead of a loss." [R. 144.]

The testimony was entirely irrelevant to any proof of any violation of any OPA law.

There was no showing that the books were books and records being kept for the purposes of the OPA Regulation; that they were anything more than joint venture records between the three joint venturers, to show what was due each.

The testimony was objected to [R. 146] as incompetent, irrelevant and immaterial and conversations were objected to. The Court asked: "What is the government's theory on that?" And the counsel for the government replied that: "It will tend to show that these defendants are partners in this concern."

What relevancy partnership is; how it could prove any criminality, we fail to see. The testimony was entirely incompetent.

Motions were made to strike the testimony of Mr. Namson, which the Court admitted, subject to a Motion to Strike [R. 146]; Motion to Strike [R. 321, 322].

There is no showing that anything was done with these books other than to keep them and correct them at the instigation of the auditor for one of the partners. There was no foundation laid for the books. Aaron Rosensweig knew nothing about the books, neither did Mr. Namson. He was not the bookkeeper for Mr. Rosensweig, but just made up the income tax. [R. 161.] It, therefore, was no proper foundation for these pages to show that they were kept in the regular order of business, and that it was usual to keep these books in the regular order of business as required by Title 28, Section 695.

IX.

The Court Erred in Admitting Hearsay Evidence as Foundation for Books and Records.

The government offered in evidence, through the witness Samuel J. Phoebus, special agent of the Bureau of Internal Revenue, pages taken from the books of the Southern California Meat Co. No. 2, and these were admitted as Exhibits 39a, 39b, and 39c, over objection. [R. 299.] The objection was three-fold:

(1) That no proper foundation had been laid, and

(2) That the testimony offered as foundation for admissibility was hearsay and

(3) that the testimony was incompetent, irrelevant and immaterial. [R. 297.]

> "Q. And under what circumstances did you see this book? In other words, tell us what happened? A. I took off a trial balance preparatory to making an examination.
>
> Q. Well, did you find the book on the floor or how did you get it? A. Mr. Stillman handed the book to me.
>
> Q. Did he say anything about it, tell you what it was? A. Well he said, 'these are the books.' He handed it to me in response to my request to have a look at the books of the Southern California Meat C., No. 2."

And further [R. 297]:

> "Q. By Mr. Strong: Of whom did you inquire? A. Mr. Stillman.
>
> Q. What did he say to you, if anything? A. That some of the entries were made by himself and some of the entries were made by the bookkeeper, Laury Rose.

Q. And did I understand that you asked him for the books of the enterprise, the Southern California Meat Co., No. 2? A. Yes, sir.

Q. And did he tell you anything about these being those books? A. Yes, sir."

This entire line of questioning was over the objection of appellants. [R. 294 *et seq.*] Whatever the purpose of the Congress in enacting Section 695 of Title 28, United States Code, may have been, it is clear beyond question that the statute does not do away with the prohibition against hearsay evidence. The statute provides in material part that writings or records made as a memorandum or record of any act, transaction, occurrence or event

"* * * shall be admissible as evidence of such act, transaction, occurrence, or event, if made in regular course of any business, and if it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event, or within a reasonable time thereafter.

All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but such circumstances shall not affect its admissibility."

The purpose of this section was to make it unnecessary to call as witnesses the particular parties who made the original entries in records kept in the regular course of business, rather than to make a fundamental change in the established principles of the shop book exception to the hearsay rule. (*N. Y. Life Ins. Co. v. Taylor,* 147 F. 2d 297 (1945).) Or as stated by another court, the intention

was to bring decisions of all federal courts into line with the modern rule that it is sufficient to show that the entry is contained in a book of regular entries maintained in the estatblishment without producing the particular person who made the original entry and having him identified.

> *Hoffman v. Palmer*, 129 F. 2d 976 (C. C. A. N. Y., 1942), aff'd 318 U. S. 109, 87 L. Ed. 645, 63 Sup. Ct. 477, rehearing den., 318 U. S. 800, 87 L. Ed. 1163, 63 Sup. Ct. 757.

The showing, as the *Hoffman* case puts it, "That the entry is contained in a book of regular entries maintained in the establishment" may not of course, be made by the use of hearsay evidence. The testimony offered by the government to identify the books and records erroneously admitted, consisting of a statement made by a person not under oath and not before the Court to a government witness, constitutes the rankest sort of hearsay. It is fundamental that, whatever the showing is that must be made under the statute, *it must be made by competent evidence.*

This is illustrated by the case of *United States v. Quick,* 128 F. 2d 832, (C. C. A. 3, 1942). The Court said:

> "* * * For the purpose of giving meaning to these otherwise meaningless book entries, the government called two witnesses, Kanter and Novick * * *. Kanter and Novick, who had never met or talked to Quick and had nothing to do with making the book entries, testified that certain of the entries indicated payments by Dewinsky to Quick or to Simmons for Quick for 'protection.' Their testimony in such regard was not by way of interpretation from any first-hand knowledge of their own but represented their conclusions drawn *from what they said Dewinsky, who kept the book, had told them.* * * *

> The statute was intended to render admissible in evidence books and records, made in the usual course of business, without further authentication, but it was not intended to make book entries the touchstone by which incompetent oral testimony would become competent." (Italics supplied.)

The same objection was made by appellants with respect to the testimony of the witness Samuel Namson, and his testimony concerning the books of the Central Packing Co. [R. 140.] The witness was a public accountant who was not an employee of the company and had no independent knowledge concerning the books or records of the concern. [R. 139.] The books were delivered to the witness by one Aaron Rosensweig. Rosensweig later testified that he "never" examined the books [R. 160], and "I don't know nothing about books." [R. 158.] The only testimony offered by the government as foundation for the introduction of Exhibit 10, consisting of 7 sheets taken from the Central Packing Co., books, and Exhibit 11, consisting of 4 sheets, was the testimony of the witness Namson. Namson's only basis for believing the books to be those of the Central Packing Co., was because Rosensweig told him. [R. 141.] The witness Rosensweig was asked by the government:

> "Q. Did you have anything to do with the books? A. I never did." [R. 157.]

And again:

> "Q. Did you handle any of the book entries on these books at the Central Packing Company? A. I never did because I can't write entries and I can't write even a letter." [R. 165.]

Rosensweig did not, himself, identify any of the books or records while on the witness stand. That the witness Namson had not the slightest connection with any books or records pertaining to the appellants was admitted by Rosensweig when, in speaking of Namson, the former said: "he is not my bookkeeper, only just the accountant for income tax." [R. 161.]

The Court not only admitted the records of the Central Packing Company solely on the basis of Namson's testimony, but permitted extensive examination of the witness concerning statements allegedly made to him by appellants with reference to certain entries. [R. 142 *et seq.*] This constituted the rankest sort of hearsay and was not admissible under any of the exceptions to the hearsay rule. It is not only fundamental, it is also elementary, that whatever evidence is offered to identify writings and records to show that they were made in the regular course of business and to show that it was the regular course of such business to make the writings or records at the time of the acts, transactions, occurrences or events reflected therein, *must be competent evidence.* Testimony consisting of statements made by third persons to a witness are clearly inadmissible. *Quick v. United States, supra.*

The entire testimony of the Messrs. Namson and Phoebus dealing as it did with specific entries made in the books and records erroneously admitted and restricted by the government at it was to specific entries in those books and records exhibited to and examined by the witnesses, would have been meaningless had not the books and records been received in evidence. The books and records could not of course, have been used by the witnesses for the purpose of refreshing memory. And any testimony

of the witnesses concerning specific entries in the books or the books thereof would have been subject to the objection that it was not the best evidence. The entire testimony of Phoebus and Namson stems from and could not have been received in the absence of the admission of the books and records into evidence. The errors were, therefore, highly prejudicial and go to the very heart of the entire case of the prosecution. In summary it can be said that the entire testimony of the government witnesses dealing with the identification of all of the books and records offered, and erroneously admitted into evidence, may be boiled down to "Mr. So-and-So told me these were the books and records." It is submitted that the Congress never intended that testimony of this calibre should be accorded any weight in the federal courts.

* * * * * * * * *

The Court erroneously charged the jury as follows:

> "There remain before you 23 counts." [R. 363.] "These are Counts 1, 2, 3, 4, 5, 6, 12, 13, 32, 37 to 50, inclusive. Of these, Count 1 has been brought under Title 18, U. S. C. S. 88, commonly called the conspiracy statute. All of the remaining 22 counts have been brought under the Emergency Price Control Act of 1942, as amended, Title 50, U. S. C. App. S. 901, etc., and regulations issued under that statute. These 22 counts pertain to alleged wilful, illegal charges for meat sold by or on behalf of the the defendants, and to alleged wilful false record entries on the books kept by or on behalf of the defendants in connection with their meat business operations under the firm names of, or in connection with the Southern California Meat Co., No. 2, and Central Packing Co. during 1944 and 1945, respectively."

This was plain error on the face of the instruction. The indictment was not brought under the Emergency Control Act of 1942, *as amended,* and regulations issued under that statute.

* * * * * * * * *

Again the Court instructed the jury [R. 362]:

> "I now instruct you that under the Emergency Price Control Act of 1942, *as amended,* and the Maximum Price Regulations, Nos. 169, 148 and 239, the highest prices which could be charged for the various meat items involved in this case are, as to each count of the indictment concerned with a sale of meat, as I shall now read to you."

Thereafter it set out certain meat prices, which did not exist under the Emergency Price Control Act of 1942 under which the indictment was brought, nor under the then existing regulations.

* * * * * * * * *

The Court again instructed the jury erroneously as follows:

> "The prices which I have read to you as the highest lawful price in effect on certain days for the several meat items, to which I have referred, were fixed in accordance with the Emergency Price Control Act of 1942 from which I have just read and those prices, and each and every one of such prices was accordingly fixed by law.
>
> "Under the Emergency Price Control Act of 1942, *as amended,* a person is prohibited from wilfully making or causing another to make any false state-

ment or entry in any document or record required to be kept under the law or regulations issued under it."

"If you are convinced beyond a reasonable doubt that the defendant did in fact sell meat to any one or more of the persons named in the several counts of the indictment, and that he did in fact charge a price or prices for such meat in excess of the prices *I have stated to you*, and that he at such time or times intended to so sell such meat at higher price or prices than permitted by the Maximum Price Regulations promulgated under the Emergency Price Control Act of 1942, then you will find that he did so with a specific intent.

"Concerning each of Counts 12, 13, 37, 38, 39, 40, 41, 42, 43, and 44 of the indictment, if you believe beyond a reasonable doubt that on or about the dates alleged in the indictment as to each of these counts, the defendants, or any defendant, sold the meat shown in each such count at a price per pound, or a total sum charged in excess of that shown on the invoice, or other record, described in each such count and introduced in evidence in this case, and that the defendants, or any defendant, wilfully and deliberately, and not as a result of innocent mistake, entered, or caused to be entered an entry upon *said invoice*, statement or other record showing such sale, to the effect that the sale was made at a price per pound below that at which the sale actually was made, then you will find the defendant or defendants guilty as charged in that count of the indictment.

"Concerning count 32, if you believe beyond a reasonable doubt that the entry alleged in such count wilfully was false, and that the defendants, or either of them, wilfully and deliberately made, or caused to

be made, such entry or entries, then you will find that defendant, or defendants, guilty as charged in that count of the indictment.

"On the other hand, if you entertain a reasonable doubt as to whether any one or more of the elements I have just recited to you have been proved, you must give the defendant or defendants the benefit of that doubt and acquit him or them.

"Concerning each of counts 2, 3, 4, 5, 6, 45, 46, 47, 48, 49 and 50, of the indictment, if you believe beyond a reasonable doubt that on or about the dates alleged in the indictment as to each of these counts, the defendants or either of them, did on that date sell the items alleged as to each such count in the indictment and that as a part of each such transaction the defendants or either of them did wilfully require of and receive from the purchaser the payment of any sum of money in excess of the maximum price per pound permissible under the Emergency Price Control Act of 1942, and the applicable price regulations issued under that law, then you will convict the defendant, or defendants, of the offense charged in that count, if you find the defendant or defendants engaged in the transaction."

"The Emergency Price Control Act of 1942, *as amended*, makes it unlawful for any person to sell or deliver any commodity, or to do or omit to do any act in violation of any regulation or price schedule, or to offer, solicit, attempt or agree to do so.

"Maximum Price Regulation No. 169 is a price regulation issued pursuant to the Emergency Price Control Act of 1942. Maximum Price Regulation No. 169 deals with beef and veal carcasses and wholesale cuts.

"*Revised* Maximum Price Regulation No. 169 in part provides:

"S. 1364.406 Evasion. (a) The price limitations set forth in this Revised Maximum Price Regulation No. 169 shall not be evaded, either by direct or indirect methods, in connection with an offer, solicitation, agreement, sale, delivery, purchase or receipt of, or relating to beef or veal, separately or in conjunction with any other commodity or service, or by way of any commission, service, transportation, wrapping, packaging, or other charge or discount premium or other privilege, or by typing agreement or other trade understanding, or by changing the selection of, grading, or the style of dressing, cutting, trimming, cooking or otherwise processing, or the canning, wrapping or packaging of beef or veal or otherwise. * * *" [R. 364-368.]

This instruction also was erroneous since prices referred to were not prices under the Emergency Price Control Act of 1942 and they were not such prices fixed by law under that act. Furthermore, the next paragraph sets forth under the Emergency Price Control Act of 1942, *as amended,* a person is prohibited from wilfully making or causing another to make any false statement or entry in any document or record required to be kept under that law or regulations issued under it.

The court at no time defined what document or record was required to be kept under the law; nor that any of the documents which the court permitted to go into evidence under the assumed theory that they were documents required to be kept under the law, were or were not such documents.

* * *

The Court again erred in giving the following instruction:

> "The Emergency Price Control Act of 1942, *as amended,* makes it unlawful for any person to sell or deliver any commodity, or to do or omit to do any act in violation of any regulation or price schedule, or to offer, solicit, attempt or agree to do so.
>
> Maximum Price Regulation No. 169 is a price regulation issued pursuant to the Emergency Price Control Act of 1942. Maximum Price Regulation No. 169 deals with beef and veal carcasses and wholesale cuts.
>
> Revised Maximum Price Regulation No. 169 in part provides." [R. 167.]

In another section the Court gave a conflicting instruction as follows:

> "The defendants are here prosecuted for alleged violations of the Emergency Price Control Act of 1942, in that they violated certain regulations issued pursuant to this act." [R. 355.]

The Court also told the jury as follows:

> "All of the remaining 22 counts have been brought under the Emergency Price Control Act of 1942, *as amended,* and regulations *under that statute."* [R. 363.]

Then the Court said:

> "Under the Emergency Price Control Act of 1942, as amended, a person is prohibited from wilfully making or causing another to make any false statement or entry in any document or record required to be kept under that law or regulations issued under it." [R. 364.]

We complain of the instructions because it is given under a statute not charged in the indictment, but under a statute "as amended" and it is given under price regulations that were nonexistent at the time of the statute in question. What we complain about is that the instruction attempted to amend the indictment by adding the words "as amended" and the jury were told that they could bring in a verdict under a law as amended, under which the defendants were not charged. This is a sheer violation of due process of law. (*DeJonge v. Oregon,* 299 U. S. 353, 81 L. Ed. 278.)

Also, we believe that the Court erred in telling the jury that Maximum Price Regulations 169, 148 and 239 were applicable. These regulations were *revised* many times, but the acts charged were in 1945, subsequent to the new Emergency Price Control Act of 1942, as amended, and revised maximum price regulations under the amended statute. The charge therefore was patently erroneous.

In addition to the other errors of instructions, however, the instruction given by the Court falls under the ban of the Court's decision in *Saul Samuel, et al. v. United States,* 169 F. 2d 789, where this Court said:

> "In a criminal case the court must instruct on all essential questions of law involved, whether or not it is requested to do so. Kreiner v. United States, 2 Cir., 11 F. 2d 722; Kinard v. United States, 68 App. D. C. 250, 96 F. 2d 522; Morris v. United States, 9 Cir., 156 F. 2d 525; United States v. Levy, 3 Cir., 153 F. 2d 995; Corson v. United States, 9 Cir., 147 F. 2d 437; Miller v. United States, 10 Cir., 120 F. 2d 968; Screws v. United States, 325 U. S. 91, 107, 65 S. Ct. 1031, 89 L. Ed. 1495, 162 A. L. R. 1330; United States v. Noble, 3 Cir., 155 F. 2d 315;

United States v. Pincourt, 3 Cir., 159 F. 2d 917; see 169 A. L. R. 305-355 on the subject generally. *We think giving the wrong law in this case was certainly not less prejudicial than omission to give the law at all.*" (Emphasis added.)

We think the language of this Court in *Samuel v. United States* squarely covers the case here and requires reversal. Furthermore, this Court said, in *Samuel v. United States,* in the learned opinion by Judge Stephens:

> "It is seen that the formula given by the court had no relation to the law as it existed during the period of the alleged conspiracy, and that it is not possible for us to make any comparison as to the effect on the maximum price between the true applicable law and the erroneous law actually applied by the jury. We are not at liberty to assume that the instruction as given was favorable to appellants and, therefore, non prejudicial."

We think much of the language is highly in point in this case. The Court, in the *Samuels* case, said:

> "The government also contends that since the court correctly instructed the jury and *there was a ceiling price* and that the case was tried upon that basis, the part of the instruction referring to a markup of 15% is surplusage. We have seen that the premise for this argument is not strictly as the government puts it; but, even so, this contention cannot be sustained."

The Court erred in giving the following instruction over objections:

> "As you all know, the Emergency Price Control Act of 1942, as amended expired on June 30th, last Sunday, and the statutes and various price regulations issued under that law are no longer in effect.

> At the times the act and violation for which the defendants are charged in this case were allegedly performed, the Emergency Price Control Act and the regulations issued under it were the law and the special provision in our laws makes violations punishable even after the Emergency Price Control Act and the price regulations have ceased to exist. Therefore, you are to consider the matters before you in this case as though the Emergency Price Control Act and the Maximum Price Regulation still remained in full force and effect." [R. 353-354.]

It was objected to [R. 326] prior to being given.

Since the Emergency Price Control Act of 1942 actually expired in 1943, June 30, 1943, and the Maximum Price Regulations under it had been revoked December 10, 1942, and revised regulations were issued from that time on and all regulations and all statutes had terminated on June 30, 1946, as far as meat was concerned, it was error to give that instruction. There was no savings clause insofar as the statute was concerned to preserve the original regulations, and along the same line the trial court erred in declining to instruct the jury that the effect of the termination of the Emergency Price Control Regulations was to terminate the prosecution of the case. [R. 329.]

On July 5, 1946, the Court pronounced judgment, sentencing the defendants to one year in jail and total fines of $19,000.00 each. [R. 53, 56.] The Court was without power to proceed under the facts and circumstances of this case.

Samuels v. U. S., 169 F. 2d 789.

The trial court erred in refusing other instructions.

The trial court refused to give the defendants' proposed instruction No. 28. [R. 67.] This instruction was as follows:

> "You are instructed that the Government in this case has produced the testimony of agents of the Internal Revenue Department to testify against the accused. Before this testimony can be received in evidence, it must be shown that the statements made were made freely and voluntarily and without the slightest pressure of fear or hope of immunity or reward of any kind or character, or of any benefits to be gained by making the statement.
>
> The mere fact that the statement as made is labeled voluntary does not make it so. You must consider the exact situation in which the accused found himself at the time of making the statement and determine from all of the facts and circumstances as they appear to you, under these instructions, whether the statements as made were freely and voluntarily made.
>
> An accused may be under the greatest of fear or have the highest hopes of reward, and yet say that he is making his statement voluntarily, when in truth and in fact, the statement was not so made in the eyes of the law. If, for the evidence in this case, you determine that any statement made by any accused to the agents of the Internal Revenue Department were not made freely and voluntarily, but were made with any hope of reward or promise of im-

munity, or to benefit the accused by making the statement, such pressure will require you to disregard the statement so made, as though it had never been made.

Lisenba vs. California, 315 U. S. 836, 86 L. ed. 1222;

Chambers vs. Florida, 309 U. S. 227, 84 L. ed. 716;

People vs. Dye, 119 Cal. App. 262." [R. 67.]

It was offered and tendered on the theory that although agents Bircher and Phoebus testified that their conversations with the defendants Stillman and Segal were voluntary, and that they secured a voluntary statement or confession from them, nevertheless the jury had the right to determine whether, under all of the circumstances, the defendants were actuated by a hope of reward of leniency from the Internal Revenue Department and therefore the statements were in fact not free and voluntary. These were proper questions to submit to the jury. (*Lisenba v. California,* 315 U. S. 826, 86 L. Ed. 1222; *Chambers v. Florida,* 309 U. S. 227, 84 L. Ed. 716; *People v. Dye,* 119 Cal. App. 262.)

To a similar effect was defendants' proposed instruction No. 26 [R. 66] as follows:

"You are instructed that if you find that any statements which any of the agents of the Internal Revenue Department testified defendants made were made or given by such defendant under compulsion or

fear of prosecution, then you must disregard such statements in determining the innocence or guilt of such defendant or defendants,"

which the Court declined.

For which errors we pray for reversals of the judgments and each of them.

Respectfully submitted,

MORRIS LAVINE,
Attorney for Appellants.

APPENDIX.

Fifth Amendment to the Constitution of the United States:

"No person shall be held to answer for capital, or otherwise infamous crime, unless on a presentment or indictment of the Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; * * *"

STATUTE RE GRAND JURIES AND THEIR CONTINUANCE.

Title 28.—Judicial Code and Judiciary:

"§421. (Judicial Code, section 284.) Same; when, how and by whom summoned; length of service.

No grand jury shall be summoned to attend any district court unless the judge thereof, in his own discretion or upon a notification by the district attorney that such jury will be needed, orders a venire to issue therefor. If the United States attorney for any district which has a city or borough containing at least three hundred thousand inhabitants shall certify in writing to a district judge of the district that the exigencies of the public service require it, the judge may, in his discretion, also order a venire to issue for a second grand jury. If the United States attorney for the southern district of New York shall certify in writing to the senior district judge of said district that the exigencies of the public service require it, said judge may, in his discretion, also order a venire to issue for a third grand jury. The district court may in term order a grand jury to be summoned at such time, and to serve such time as it may direct, whenever, in its judgment, it may be proper to do so. **A district judge may, upon request of the district attorney or**

of the grand jury or on his own motion, by order authorize any grand jury to continue to sit during the term succeeding the term at which such request is made, solely to finish investigations begun but not finished by any such grand jury, but no grand jury shall be permitted to sit in all during more than eighteen months: Provided, That, for good cause shown, the court may, at any time after the end of the term for which the grand jury was originally summoned, excuse any member of the grand jury and summon and impanel another person in his place. Nothing herein shall operate to extend beyond the time permitted by law the imprisonment before indictment found of a person accused of crime or offense, or the time during which a person so accused may be held under recognizance before indictment found. (Mar. 3, 1911, ch. 231, §284, 36 Stat. 1165; Feb. 25, 1931, ch. 297, 46 Stat. 1417; Aug. 24, 1937, ch. 746, 50 Stat. 748; Apr. 17, 1940, ch. 101, 54 Stat. 110.)"

IV.

Income Tax Returns. When Public. Privacy of Information.

Title 26, Section 55, U. S. C. A.—Income Tax:

"§55. Publicity of returns.

(a) Public record and inspection.

(1) Returns made under this chapter upon which the tax has been determined by the Commissioner shall constitute public records; but, except as hereinafter provided in this section, they shall be open to inspection only upon order of the President and under rules and regulations prescribed by the Secretary and approved by the President.

(2) And all returns made under this chapter, subchapters A, B, D, and E of Chapter 2, subchapter B of Chapter 3, Chapters 4, 7, 12 and 21, subchapter A of Chapter 29, and Chapter 30, shall constitute public records and shall be open to public examination and inspection to such extent as shall be authorized in rules and regulations promulgated by the President.

(3) Whenever a return is open to the inspection of any person a certified copy thereof shall, upon request, be furnished to such person under rules and regulations prescribed by the Commissioner with the approval of the Secretary. The Commissioner may prescribe a reasonable fee for furnishing such copy."

Title 26, U. S. C.:

"Sec. 55. Publicity of returns.—

* * * * * * * *

(f) Penalties for disclosing information.

(1) Federal employees and other persons.

It shall be unlawful for any collector, deputy collector, agent, clerk, or other officer or employee of the United States to divulge or to make known in any manner whatever not provided by law to any person the amount or source of income, profits, losses, expenditures, or any particular thereof, set forth or disclosed in any income return, or to permit any income return or copy thereof or any book containing any abstract or particulars thereof to be seen or examined by any person except as provided by law; and it shall be unlawful for any person to print or publish in any manner whatever not provided by law any income return, or any part thereof, or expenditures

appearing in any income return; and any offense against the foregoing provision shall be a misdemeanor and be punished by a fine not exceeding $1,000 or by imprisonment not exceeding one year, or both, at the discretion of the court; and if the offender be an officer or employee of the United States he shall be dismissed from office or discharged from employment."

Title 28.—Judicial Code and Judiciary.—Section 695, U. S. Code:

"§695. Admissibility.

In any court of the United States and in any court established by Act of Congress, any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of said act, transaction, occurrence, or event, if it shall appear that it was made in the regular course of any business, and that it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter. All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but they shall not affect its admissibility. The term "business," shall include business, profession, occupation, and calling of every kind. (June 20, 1936, ch. 640, §1, 49 Stat. 1561.)"

Conspiracy Statute.

Title 18, Section 88 (1946 edition), provides as follows:

"If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000, or imprisoned not more than two years, or both. (Mar. 4, 1909, ch. 321, §37, 35 Stat. 1096.)"

Emergency Price Control Act of 1942. Pertinent Provision.

Title 50 App., Section 901(b), the Emergency Price Control Act of 1942, provides as follows:

"The provisions of this Act, and all regulations, orders, price schedules, and requirements thereunder, shall terminate on June 30, 1943, or upon the date of a proclamation by the President, or upon the date specified in a concurrent resolution by the two Houses of the Congress, declaring that the further continuance of the authority granted by this Act is not necessary in the interest of the national defense and security, whichever date is the earlier. . . ." (Note: As to meat, all statutes and regulations terminated June 30, 1946.)

Title 50 App., Section 902(a), Emergency Price Control Act of 1942, provides as follows:

"Whenever in the judgment of the Price Administrator (provided for in section 201 (section 921 of this Appendix)) the price or prices of a commodity or commodities have risen or threaten to rise to an extent or in a manner inconsistent with the purposes of this Act, he may by

regulation or order establish such maximum price or maximum prices as in his judgment will be generally fair and equitable and will effectuate the purposes of this Act. So far as practicable, in establishing any maximum price, the Administrator shall ascertain and give due consideration to the prices prevailing between October 1 and October 15, 1941 (or if, in the case of any commodity, there are no prevailing prices between such dates, or the prevailing prices between such dates are not generally representative because of abnormal or seasonal market conditions or other cause, then to the prices prevailing during the nearest two-week period in which, in the judgment of the Administrator, the prices for such commodity are generally representative), for the commodity or commodities included under such regulation or order, and shall make adjustments for such relevant factors as he may determine and deem to be of general applicability, including the following: Speculative fluctuations, general increases or decreases in costs of production, distribution, and transportation, and general increases or decreases in profits earned by sellers of the commodity or commodities, during and subsequent to the year ended October 1, 1941. Every regulation or order issued under the foregoing provisions of this subsection shall be accompanied by a statement of the considerations involved in the issuance of such regulation or order. As used in the foregoing provisions of this subsection, the term "regulation or order" means a regulation or order of general applicability and effect. Before issuing any regulation or order under the foregoing provisions of this subsection, the Administrator shall, so far as practicable, advise and consult with representative members of the industry which will be affected by such regulation or order. In the case of any

commodity for which a maximum price has been established, the Administrator shall, at the request of any substantial portion of the industry subject to such maximum price, regulation, or order of the Administrator, appoint an industry advisory committee, or committees, either national or regional or both, consisting of such number of representatives of the industry as may be necessary in order to constitute a committee truly representative of the industry, or of the industry in such region, as the case may be. The committee shall select a chairman from among its members, and shall meet at the call of the chairman. The Administrator shall from time to time, at the request of the committee, advise and consult with the committee with respect to the regulation or order, and with respect to the form thereof, and classifications, differentiations, and adjustments therein. The committee may make such recommendations to the Administrator as it deems advisable. Whenever in the judgment of the Administrator such action is necessary or proper in order to effectuate the purposes of this Act, he may, without regard to the foregoing provisions of this subsection, issue temporary regulations or orders establishing as a maximum price or maximum prices the price or prices prevailing with respect to any commodity or commodities within five days prior to the date of issuance of such temporary regulations or orders; but any such temporary regulation or order shall be effective for not more than sixty days, and may be replaced by a regulation or order issued under the foregoing provisions of this subsection."

Title 50 App., Section 904(a), Emergency Price Control Act of 1942, provides as follows:

"It shall be unlawful, regardless of any contract, agreement, lease, or other obligation heretofore or hereafter entered into, for any person to sell or deliver any commodity, or in the course of trade or business to buy or receive any commodity, or to demand or receive any rent for any defense-area housing accommodations, or otherwith to do or omit to do any act, in violation of any regulation or order under section 2 (section 902 of this Appendix), or of any regulation, order, or requirement under section 202 (b) or section 205 (f) (sections 922 (b) or 925 (f) of this Appendix), or to offer, solicit, attempt, or agree to do any of the foregoing."

Title 50 App., Section 925(b), Emergency Price Control Act of 1942, provides as follows:

"Any person who willfully violates any provision of section 4 of this Act (section 904 of this Appendix), and any person who makes any statement or entry false in any material respect in any document or report required to be kept or filed under section 2 or section 202 (sections 902 or 922 of this Appendix), shall, upon conviction thereof, be subject to a fine of not more than $5,000, or to imprisonment for not more than two years in the case of a violation of section 4 (c) (section 904 of this Appendix) and for not more than one year in all other cases, or to both such fine and imprisonment. Whenever the Administrator has reason to believe that any person is liable to punishment under this subsection, he may certify the facts to the Attorney General, who may, in his discretion, cause appropriate proceedings to be brought."

The pertinent provisions of Maximum Price Regulation 169—the regulation relating to beef and veal issued under the Emergency Price Control Act of 1942 is as follows:*

Maximum Price Regulation 169 (7 F. R. 4653) was thereafter amended and was Revised Maximum Price Regulation 169.

7 F. R. 5222, 7 F. R. 5426, 7 F. R. 5868, 7 F. R. 6659, 7 F. R. 7314, 7 F. R. 7779, 7 F. R. 7966, 7 F. R. 8948.

Maximum Price Regulation 169 and all its revisions and the title and preamble were amended December 16, 1942 and the applicable sections regarding prices—being Sections 1364.51 through 1364.67—were revoked.

On December 12, 1942, effective December 16, 1942, Revised Maximum Price Regulation added §§1364.401 to 1364.414, §§1364.451 to 1364.455, §§1364.476 to 1364.477, and §§1364.526 to 1364.530 to read as set forth herein. (7 Federal Register 10381.)

Maximum Price Regulation 169 was issued May 11, 1942, at wholesale, and May 18, 1942, at retail. The Regulation fixed maximum selling prices for beef and veal and their products at each seller's highest March selling prices. The Regulation provided that the highest prices should be ascertained by class of purchaser, and that the seller should not change his customary allowances, discounts, or other price differentials unless such change would result in a lower price. In other words, the entire price structure of beef and veal and their

---

*The whole regulation has been furnished to the clerk. It is set out in 7 Federal Register 4687.

products as well as the prevailing business practices were frozen at their March levels.

On June 19, 1942, the Price Administrator issued Maximum Price Regulations 169, effective July 13, 1942, applicable to beef and veal carcasses and wholesale cuts. The regulation required the maximum selling price for each grade of carcass and quarter of beef to be the price at or above which the seller sold at least 30 per cent of the total quantity of that grade of carcass or quarter of beef sold by him in the base period March 16 to March 28, 1942, and requiring all sellers to grade carcasses and wholesale cuts in accordance with grading specifications of the Agricultural Marketing Service of the United States.

The Regulation was based on information received from members of the industry and independent sources, and on the theory the highest prices at or above which at least 30 per cent of each grade and cut of beef was sold from March 16 to March 28, 1942.

Amendment No. 1 revised the method of car route pricing to provide for a basic price at the sellers' plant rather than at the farthest zone; it permitted each seller to adjust his maximum prices for fores and hindquarters separately, and it granted adjustments under certain conditions to sellers whose maximum prices placed them in an abnormally disadvantageous relationship to their competitors.

Five additional amendments were issued, which related to sellers to hotels, sellers to armed forces and other matters.

Thus, Regulations 169, 148, 156 and 239 had no fixed prices and were issued under the Emergency Price Con-

trol Act of 1942 prior to any amendment. These Regulations were all repealed by the Administrator himself on December 12, 1942, effective December 16, 1942. (7 Federal Regulation 10381.)

Maximum Price Regulation 169 was revised several times, see Pike & Fisher OPA Service 9* pages 41:291 §1364.410 page 41:295C, §§1364.412 and 1364.414, page 41:298, table of Amendments page 41:298-D, as follows:

"(Preamble) The title and preamble are amended, effective December, 1942, §§1364.51 through 1364.67 are revoked, and §§1364.401 to 1364.414, §§1364.451 to 1364.455, §§1364.476 to 1364.477, and §§1364.526 to 1364.530 are added to read as set forth herein:

Revised Maximum Price Regulation No. 169—Beef and Veal Carcasses and Wholesale Cuts.

In the judgment of the Price Administrator, it is necessary and proper, in order to effectuate the purposes of the Emergency Price Control Act of 1942, as amended, and Executive Order No. 9250 issued by the President on October 3, 1942, to maintain as the maximum prices for processed products the prices prevailing with respect thereto during the period March 16, to March 28, 1942, inclusive, and to establish for beef carcasses and wholesale cuts specific prices slightly higher than those prevailing during such period. These prices are established as provided in §§1364.451, 1364.452 for beef; §§1364.466 and 1364.467 for veal; and §1364.476 for processed products. The Price Administrator has ascertained and given due consideration to the prices of beef and veal carcasses and wholesale cuts prevailing between October 1 and October 15, 1941, and has made adjustments for such relevant factors as he has determined and deemed

to be of general applicability. So far as practicable, the Price Administrator has advised and consulted with representative members of the industry which will be affected by this regulation.

In the judgment of the Price Administrator the maximum prices established by this regulation are and will be generally fair and equitable and will effectuate the purposes of said Act and Executive Order. A statement of the considerations involved in the issuance of this regulation has been issued simultaneously herewith and has been filed with the Division of the Federal Register.

. . .

Therefore, under the authority vested in the Price Administrator by the Emergency Price Control Act of 1942, as amended, and Executive Order No. 9250 and in accordance with Revised Procedural Regulation No. 1, issued by the Office of Price Administration, Revised Maximum Price Regulation No. 169 is hereby issued." (P & F OPA Service 9* p. 41:291.)

§1364.410 Petitions for Amendment.

"Any person seeking an amendment of any provision of this Revised Maximum Price Regulation No. 169 may file a petition for amendment in accordance with the provisions of Revised Procedural Regulation No. 1, as amended, issued by the Office of Price Administration."

§1364.412 Applicability of General Maximum Price Regulation.

"The provisions of this Revised Maximum Price Regulation No. 169 supersede the provisions of the General Maximum Price Regulation with respect to sales and deliveries for which maximum prices are established by this revised regulation."

§1364.414 Effective Date.

"Revised Maximum Price Regulation No. 169 (§§ 1364.401 to 1364.414, inclusive; §§1364.451 to 1364.455, inclusive; §§1364.476 to 1364.477, inclusive; and §§ 1364.526 to 1364.530, inclusive) shall become effective December 16, 1942, except that it shall become effective December 10, 1942, as to sales to a war procurement agency."

TABLE OF AMENDMENTS.

Amdt. No.	Date Issued	Date Effective	Fed. Reg. Citation	Sections Affected
				1364:
4	3-30-43	4- 3-43	8 FR 4097	
5	4-10-43	4-10-43	8 FR 4786	
6	4-12-43	4-14-43	8 FR 4844	
7	4-16-43	4-16-43	8 FR 5170	
8	4-23-43	4-23-43	8 FR 5478	
9	4-28-43	4-28-43	8 FR 5634	
11	5-14-43	5-14-43	8 FR 6427	
12	5-26-43	6- 1-43	8 FR 7109	407(e), 415, 452(o), 455(a), (b), (c), 467(d)(2), 467(n), 470(a), (b)
13	5-22-43	6- 1-43	8 FR 6945	452(d)(2), (3), 452(l)(2), 452(n)(2)
14	5-27-43	5-24-43	8 FR 7199	452(m)(2), 453(b)
15	6- 7-43	*	8 FR 7675	401(e), 452(d)(2) and (3), (l)(2), (m)(2), (n)(2), (n)(3), (o)(4), (5), and (6), (p)(3), (p)(7)(i), (p)(8), 453(d), 454(d), 455(a)(9)(xv), 467(d)(2), (l)(2), (m)(2), (n)(4) and (5), 476(l)
16	6-10-43	6- 8-43	8 FR 8011	452(m)(2), 453(b)
17	6-22-43	6-14-43	8 FR 8677	Effective date, Amdt. No. 15
18	6-24-43	6-22-43	8 FR 8756	453(b)

Amdt. No.	Date Issued	Date Effective	Fed. Reg. Citation	Sections Affected
19	6-30-43	6-30-43	8 FR 9066	468(b)
20	7-22-43	7-28-43	8 FR 10362	406(b)(4), 407(e)(1)(2), 415(a), (b), (c), 452(o)(3), 455(b)(2)(ii)
21	7-16-43	7-16-43	8 FR 9995	452(m)(2), 453(b), 454(d), 468(b), 469(d)
22	7-22-43	7-28-43	8 FR 10363	405(c), 405(d)
23	7-29-43	7-29-43	8 FR 10671	425(p)(3), (7)
24	8- 7-43	8- 7-43	8 FR 11081	415(a), 452(p)(3), 455(b)(1), (2)(v), 470(b)(1), (2)(ii), (v)
25	8-12-43	7-16-43	8 FR 11298	401(d), 411, 411(c), 452(d)(2), (3), 467(d)(2)
26	8-16-43	8-16-43	8 FR 11445	406(c), 405(d), 407(d)(2)
27	9-16-43	9-16-43	8 FR 12748	407(f)(1), (2)
28	9-27-43	10- 2-43	8 FR 13249	406(d), 452(a)(1), 452(b)(1), (m)(2), (3), (o)(4), (5), (6), (p)(3), 454(a)(1), (6), 469(a)(1), 469(a)(6)
29	9-25-43	9-29-43	8 FR 13181	407(f)(2)
30	9-25-43	9-25-43	8 FR 13181	452(m)(2), (3) (same changes as in Amdt. No. 28)
31	10-11-43	10-16-43	8 FR 14009	452(o)(4), (5), (p)(3), (7)(ix)(x)
32	10-21-43	10-21-43	8 FR 14305	452(m)(4), (5), (6)
33	11-11-43	11-11-43	8 FR 15527	405, 405(e)
34	11-30-43	12- 1-43	8 FR 16290	405(f), 531
35	12- 7-43	12-13-43	8 FR	452(d)(2), (3), (l)(2)
36	1-28-44	2- 3-44	9 FR	406(a), 407(e), 415(a), (b), (c), (d), (e), 416, 417, 452(o)(1), (2), (3), 454(d), 455(b)(1), (4), (5), (6), 467(n), 468(d), 470(b)(1), (4), (5), (6)

Revised Maximum Price Regulation No. 169 in part pro-(372) vides:

"S. 1364.406 Evasion. (a) The price limitations set forth in this Revised Maximum Price Regulation No. 169, shall not be evaded, either by direct or indirect methods, in connection with an offer, solicitation, agreement, sale, delivery, purchase or receipt of, or relating to beef or veal, separately or in conjunction with any other commodity or service, or by way of any commission, service, transportation, wrapping, packaging or other charge or discount premium or other privilege, or by tying agreement or other trade understanding, or by changing the selection of, grading, or the style of dressing, cutting, trimming, cooking or otherwise processing, or the canning, wrapping or packaging of beef or veal or otherwise: * * *"

"S. 1364.407 Records and reports. * * *

(a) Every person making a sale and every person in the course of trade or business making a purchase of any beef carcass, beef wholesale cut, veal carcass or veal wholesale cut or other meat item subject to this revised regulation, shall make and preserve for inspection by the Office of Price Administration for so long as the Emergency Price Control Act of 1942, as amended, remains in effect, complete and accurate records of each such sale or purchase, showing the date thereof, the name and address of the buyer and seller, the quantity, type of cut or item, grade or grades and weight of (373) all beef carcasses, beef wholesale cuts, veal carcasses and veal whole-

sale cuts or other meat items subject to this revised regulation sold or purchased and the price charged or received or paid therefor."

* * * * * * * * *

"S. 1364.401 Prohibition against selling beef and veal carcasses and wholesale cuts at prices above the maximum.—(a) Beef carcasses and wholesale cuts. On and after December 16, 1942, regardless of any contract, agreement, or other obligation no person shall sell or deliver any beef carcass or beef wholesale cut, and no person shall buy or receive any beef carcass or beef wholesale cut at a price higher than the maximum price permitted by S. 1364.451; and no person shall agree, offer, solicit or attempt to do any of the foregoing. * * *"

(a) *Maximum prices for products not shipped via car route or by carload.* Except as provided in paragraphs (d) and (f) of this section, each seller's maximum price for each beef or veal carcass or wholesale cut not shipped via car route or by carload shall be computed as follows:

(1) The maximum price for each grade of each beef or veal *carcass* shall be the highest price actually charged by the seller during the period March 16 to March 28, 1942, at or above which at least 30% of the total weight volume of the seller's sales of carcasses of the same grade were made during such period.

EXAMPLE: Assume that the seller's sales of choice carcasses of beef during the base period, March 16 to March 28, were as follows:

Price per lb:	Weight Volume in lbs.	Percentage of total Weight Volume (percent)
24¢	1,000	4
23½¢	2,000	8
23¢	4,000	16
22¾¢	5,000	20
22½¢	8,000	32
22¢	4,000	16
21½¢	1,000	4
Total weight Volume	25,000	

The seller's maximum price for choice carcasses of beef is 22¾¢ per lb., for that is the highest price actually charged by him at or above which he made at least 30% of the total weight volume of his sales of such carcasses during the base period. 23¢ cannot be his maximum price, because only 28% of the total weight volume of sales was made at or above that price. 22⅞¢ cannot be his maximum price, for he made no sales during the base period at that price.

(2) The maximum price for each grade of fore-quarter of beef, hind quarter of beef, fore-quarter of veal, hind-quarter of veal, fore-saddle of veal, and hind-saddle of veal shall be determined as follows:

(1) The seller shall ascertain the highest price actually charged by him during the period March 16 to March 28, 1942, at or which at least 30% of the total weight volume of his sales of such fore-quarter, hind-quarter, fore-saddle or hind-saddle was made during the period March 16 to March 28, 1942.

(ii) In the event that the sales of fores and hinds of each grade at the prices computed in subparagraph (2)(i) above would yield a greater total sales realization when sold separately, then the total sales realization, obtainable from the sales of the same fores and hinds of each grade in carcass form, at the seller's maximum price for a carcass of such grade, the seller shall adjust downward the prices of such fores and hinds to remove such excess. In making such adjustment the seller shall not change the price differential in cents per pound between hinds and fores as established pursuant to subparagraph (2)(i). The price so fixed and adjusted shall be the seller's maximum price for such quarter or saddle, and he may not thereafter charge any higher price.

(3) The maximum price for each grade of each *wholesale cut derived from a quarter or saddle shall* be determined as follows:

(i) The seller shall fix a price for each such cut upon the basis of the relationship which prevailed, during the base period March 16 to March 28, 1942, between the price of such cut and the prices of the other cuts derived from a quarter or saddle of the same grade.

(ii) In the event that the total gross proceeds obtainable through sales at the prices so fixed of *all* cuts derived from such quarter or saddle exceeds by more than $1.00 per cwt. the total gross proceeds obtainable through the sale of such quarter or saddle, uncut, at its maximum price, the seller shall adjust downward the prices of such cuts to remove the excess over $1.00 per cwt. In making such adjustments, the seller shall not change the relationship of such prices as established pursuant to subpara-

graph (3(i). The price so fixed and adjusted shall be the seller's maximum price for such wholesale cut.

NOTE: In making computations of total weight volume required by paragraph (a) of this section, the seller shall omit all sales of products which he shipped via car route or by carload.

§1364.53 Duty to maintain and identify grades. No person shall sell or offer for sale, and no person in the course of trade or business shall buy or receive any beef or veal carcass or wholesale cut unless each such carcass or cut has been identified by grade in accordance with the provisions of this section. Each seller shall maintain uniform grades, as specified in paragraph (a) of this section; shall compute his maximum prices upon the basis of such uniform grades rather than upon the basis of his own grades, as provided in paragraph (b) of this section; and shall identify his products by grade letter, as provided by paragraph (c) of this section.

(a) *Uniform grades.* (1) Beef carcasses and wholesale cuts derived from steers and heifers shall be graded into the following uniform grades: choice, good, commercial, utility and cutter and canner. Beef carcasses and wholesale cuts derived from cows shall be graded choice. In determining the grade of each such carcass or cut, the seller shall use the "Specification for Official United States Standards for Grades of Carcass Beef"[3] set forth in Appendix A hereof, and incorporated herein as §1364.64, except that, the specifications therein for the two grades,

---

[3]Service and Regulatory Announcements No. 99, Official United States Standards for Grades of carcass Beef, United States Department of Agriculture, Agricultural Marketing Administration, issued as amended May, 1942.

cutter and canner, shall be combined and treated as a single grade, and the specifications therein for the two grades, prime and choice, shall be combined and treated as a single grade, choice.

(2) Veal and calf carcasses and wholesale cuts shall be graded into the following uniform grades: choice, good, commercial, utility and culls. In determining the grade of each such carcass or cut, the seller shall use the "Specification for Official United States Standards for Grades of Veal and Calf Carcasses,"[4] set forth in Appendix B hereof and incorporated herein as §1364.65, except that the specifications therein for the two grades, prime and choice, shall be combined and treated as a single grade, choice.

---

[4]Service and Regulatory Announcements No. 114, Official United States Standards for Grades of Veal and Calf Carcasses, United States Department of Agriculture, Agricultural Marketing Administration, issued as amended, October, 1940.